No. 05-493
Title: Robert L. Ayers, Jr., Acting Warden, Petitioner
v.
Fernando Belmontes
Docketed: October 18, 2005
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (01-99018)
Decision Date: July 15, 2005
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Oct 12 2005	Petition for a writ of certiorari filed. (Response due November 17, 2005)
Nov 30 2005	DISTRIBUTED for Conference of January 6, 2006.
Dec 28 2005	Response Requested . (Due January 27, 2006)
Jan 5 2006	Letter of December 27, 2005, from counsel for petitioner received.
Jan 26 2006	Brief of respondent Fernando Belmontes in opposition filed.
Jan 26 2006	Motion for leave to proceed in forma pauperis filed by respondent Fernando Belmontes.
Feb 6 2006	Reply of petitioner Steven Ornaski, Warden filed. (Distributed)
Feb 8 2006	DISTRIBUTED for Conference of February 24, 2006.
Feb 27 2006	Record Requested .
Feb 27 2006	DISTRIBUTED for Conference of March 3, 2006.
Mar 1 2006	Record received from the United States Court of Appeals for the 9th Circuit (one envelope).
Mar 1 2006	Record received from the United States District Court Eastern District of California (Sacramento) (4 boxes).
Mar 13 2006	DISTRIBUTED for Conference of March 17, 2006.
Mar 20 2006	DISTRIBUTED for Conference of March 24, 2006.
Mar 27 2006	DISTRIBUTED for Conference of March 31, 2006.
Apr 10 2006	DISTRIBUTED for Conference of April 14, 2006.
Apr 17 2006	DISTRIBUTED for Conference of April 21, 2006.
Apr 24 2006	DISTRIBUTED for Conference of April 28, 2006.
May 1 2006	Motion for leave to proceed in forma pauperis filed by respondent GRANTED.
May 1 2006	Petition GRANTED.
May 13 2006	Motion to appoint counsel filed by respondent Fernando Belmontes.
May 23 2006	Motion DISTRIBUTED for Conference of June 8, 2006.
Jun 12 2006	Motion to appoint counsel filed by respondent GRANTED. Eric S. Multhaup, Esquire, of Mill Valley, California is appointed to serve as counsel for the respondent in this case.
Jun 13 2006	Extension of time within which to file the joint appendix and petitioner's brief on the merits to and including June 22, 2006.
Jun 15 2006	Additional record received from U.S.C.A. 9th Circuit. (1 box)
Jun 19 2006	Joint appendix filed.
Jun 19 2006	Brief of petitioner Robert L. Ayers, Jr., Acting Warden filed.
Jun 19 2006	Brief amicus curiae of Criminal Justice Legal Foundation filed.

Jun 22 2006	Brief amici curiae of Texas and Sixteen Other States filed.
Jul 14 2006	SET FOR ARGUMENT on Tuesday, October 3, 2006.
Jul 17 2006	CIRCULATED.
Jul 17 2006	Extension of time within which to file respondent's brief on the merits to and including August 7, 2006.
Aug 7 2006	Brief of respondent Fernando Belmontes filed. (Distributed)
Sep 11 2006	Reply of petitioner Robert L. Ayers, Jr., Acting Warden filed. (Distributed)
Oct 3 2006	Argued. For petitioner: Mark A. Johnson, Deputy Attorney General, Sacramento, Cal. For respondent: Eric S. Multhaup, Mill Valley, Cal. (Appointed by this Court.)

Supreme Court, U.S.
FILED
OCT 12 2005
OFFICE OF THE CLERK

No. 05-493

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ORNASKI, *Petitioner,*

v.

FERNANDO BELMONTES, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
DONALD E. DE NICOLA
Deputy Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
MARK A. JOHNSON
Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960
Counsel for Petitioner

CAPITAL CASE
QUESTIONS PRESENTED

In *Boyde v. California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the so-called "unadorned factor (k)," which directs juries to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This Court found jurors would reasonably understand this instruction to encompass mitigating factors unrelated to the crime itself, such as the defendant's background and character.

In this case, the Ninth Circuit Court of Appeals held that the use of this same instruction violated the Eighth Amendment of the United States Constitution because it likely misled the jurors to believe they were forbidden from considering background and character evidence relating to "forward-looking" considerations about the defendant's future prospects if sentenced to life in prison.

The questions presented are:

1. Does *Boyde* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2. Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989)?

TABLE OF CONTENTS

	Page
OPINION OR JUDGMENT BELOW	1
STATEMENT OF JURISDICTION	2
RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES	2
STATEMENT OF THE CASE	2
State Court Proceedings	3
Federal Proceedings	6
REASONS FOR GRANTING THE WRIT	9
ARGUMENT	10
I. THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE*	10
A. California's "Unadorned Factor (k)" Instruction Does Not Preclude Consideration Of "Forward-Looking" Evidence Offered In Mitigation	11
B. The Ninth Circuit's Interpretation Of *Boyde* Threatens Numerous Other Capital Cases In California And In Other States	15
C. The Panel Majority's Decision In This Case Illustrates The Ninth Circuit's Fundamental Misunderstanding Of The Controlling Standard For Assessing Constitutional Instructional Error Enunciated In *Boyde*	21

TABLE OF CONTENTS (continued)

Page

II. THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE V. LANE*, 489 U.S. 288 (1989) 21

CONCLUSION 23

TABLE OF AUTHORITIES

	Page
Cases	
Belmontes v. California 488 U.S. 1034 (1989)	6, 22
Belmontes v. Woodford 350 F.3d 861 (9th Cir. 2003)	1
Belmontes v. Woodford 359 F.3d 1079 (9th Cir. 2004)	1
Blystone v. Pennsylvania 494 U.S. 299 (1990)	8
Boyde v. California 494 U.S. 370 (1990)	ii, 6, 8-11, *passim*
Brown v. Belmontes 125 S.Ct 1697 (2005)	16
Brown v. Payton 544 U.S. __, 125 S.Ct. 1432 (2005)	9, 13, 15
Buchanan v. Angelone 522 U.S. 269 (1998)	7
Butler v. McKellar 494 U.S. 407 (1990)	21
California v. Brown 479 U.S. 538 (1987)	15
Cupp v. Naughten 414 U.S. 141 (1973)	20

TABLE OF AUTHORITIES (continued)

	Page
Graham v. Collins 506 U.S. 461 (1993)	21
Johnson v. Texas 509 U.S. 350 (1993)	7, 14
Lambrix v. Singletary 520 U.S. 518 (1997)	22
Payton v. Woodford 346 F.3d 1204 (9th Cir. 2003)	16, 20, 22
People v. Belmontes 45 Cal.3d 744 (1988)	1
People v. Easley 34 Cal.3d 858 (1983)	16
Skipper v. South Carolina 476 U.S. 1 (1986)	12, 14, 19, 20, 22
Stringer v. Black 503 U.S. 222 (1992)	21
Teague v. Lane 489 U.S. 288 (1989)	ii, 21
Tuilaepa v. California 512 U.S. 967 (1994)	8
Weeks v. Angelone 528 U.S. 225 (2000)	19

TABLE OF AUTHORITIES (continued)

	Page
Constitutional Provisions	
United States Constitution Eighth Amendment	2
Statutes	
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2254	9
California Penal Code § 190.2(a)	3
California Penal Code § 190.3	2
Other Authorities	
Cal. Jury Instructions, Criminal ("CALJIC"), No. 8.84.1 (4th ed. 1979)	4
Webster's Unabridged Dictionary (2nd ed. 1979)	12

IN THE SUPREME COURT OF THE UNITED STATES

No.

STEVEN ORNASKI, *Petitioner,*

v.

FERNANDO BELMONTES, *Respondent.*

Steven Ornaski, Warden,[1/] California State Prison at San Quentin [hereinafter petitioner], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Ninth Circuit Court of Appeals following remand by this Court (App.230a-320a) is reported at *Belmontes v. Brown,* 414 F.3d 1094 (9th Cir. 2005) (*Belmontes II*). This Court's prior order granting certiorari and remanding to the Ninth Circuit is reported at *Brown v. Belmontes*, 125 S.Ct 1697, 161 L.Ed 518 (2005). The opinion of the Ninth Circuit preceding remand by this Court (App. 1a-84a) is reported at *Belmontes v. Woodford*, 359 F.3d 1079 (9th Cir. 2004) (*Belmontes I*). The order of the District Court (App. 101a-146a) is unreported.

The opinion of the Supreme Court of California on direct appeal (App. 147a-229a) is reported at *People v. Belmontes*, 45

---

1. Jill L. Brown is no longer warden of San Quentin State Prison. The warden is now Steven Ornaski.

Cal.3d 744, 755 P.2d 310, 248 Cal. Rptr. 2d 126 (1988), *cert. denied*, 488 U.S. 1034 (1989).

STATEMENT OF JURISDICTION

A majority panel of the Ninth Circuit entered judgment granting habeas corpus relief on July 15, 2005. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

California Penal Code section 190.3 provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

STATEMENT OF THE CASE

On March 15, 1981, respondent Fernando Belmontes armed himself with a metal dumbbell bar and went to burglarize the home of 21-year-old Steacy McConnell in Victor, California. Steacy was home when Belmontes arrived. After entering the house and discovering Steacy, Belmontes savagely beat and killed her with the metal bar, severely fracturing her skull with about 20 blows and causing approximately 15 gaping wounds to the left forehead and behind her left ear. In an

apparent attempt to ward off the brutal attack, Steacy also suffered defensive wounds to her arms, legs, and feet. After delivering these fatal blows, Belmontes stole Steacy's stereo equipment.

Moments later, Belmontes explained to his two accomplices (who had been waiting outside in a getaway car) that he had hit Steacy about 15 times because she was home, and that he had to take her out as a witness. Later that afternoon, Belmontes sold Steacy's stereo for $100, split the money with his accomplices to the crime, and used some of it to buy beer.

State Court Proceedings

Following a trial in the San Joaquin County Superior Court, a jury found Belmontes guilty of first-degree murder. The jury also found true several special circumstances, rendering Belmontes eligible for the death penalty under California law. Cal. Pen. Code, § 190.2(a).

At the penalty-phase trial, the prosecutor introduced evidence in aggravation of the following prior instances of Belmontes' violent or criminal conduct: (1) Belmontes' theft of a handgun in early 1979; (2) Belmontes' carrying the gun for protection during the same time period; (3) Belmontes' April 1979 conviction as an accessory to voluntary manslaughter; (4) a domestic aggravated assault and battery Belmontes committed on his pregnant girlfriend the month preceding Steacy's murder; and (5) an assault Belmontes committed while he was a ward in a county youth facility. The prosecution also presented aggravating evidence of autopsy photographs depicting the nature and extent of Steacy's fatal injuries.

In mitigation, Belmontes' defense presented evidence of: (1) Belmontes' impoverished, unstable, and abusive upbringing; (2) Belmontes' caring and wholesome relationships with a number of decent friends and family members, and (3) Belmontes' good performance during a prior commitment to the California Youth Authority (CYA). This latter category of

evidence related in part to Belmontes' participation in a church-related "M-2" sponsorship program provided at CYA. This evidence was offered to show (1) more good relationships with decent people, (2) that Belmontes had made a legitimate religious conversion, and (3) that Belmontes was, therefore, a "salvagable" person who would be able to assist other inmates if committed to prison for life.

Following this evidence, the trial court instructed the jury pursuant to California's then-existing "catch-all" mitigation evidence instruction ("unadorned factor (k)"). That instruction echoed the language of California Penal Code section 190.3(k), and advised the jurors:

> In determining which penalty is to be imposed on the defendant, you shall consider all of the evidence which has been received during any part of trial in this case, except as you may be hereafter instructed. You shall consider, take into account and be guided by the following factors, if applicable:
>
> . . .
>
> Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Cal. Jury Instructions, Criminal ("CALJIC"), No. 8.84.1 (4th ed. 1979).

The trial court also gave the jury the following "special instruction":

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

Both parties acknowledged that the jury could, and should,

consider Belmontes' future prospects. Belmontes himself testified and asked the jury for life in prison because, in prison, "there is an opportunity to achieve goals and try to better yourself." He asked the jury to spare his life so he could "try to improve" himself. In closing statement, defense counsel argued that, in light of the evidence of Belmontes' prior CYA commitment, although he could not "make it on the outside," he could "fit[ ] into the system" and "contribute something" in the future. The prosecutor also acknowledged that the jury could and should consider Belmontes' future prospects of a life in prison in determining the proper punishment: "And I think that value to the community [in the future] is something that you have to weigh in. There's something to that."

During jury deliberations, the trial court conducted a brief, informal exchange with the jurors in response to some of their questions:

> Juror Hern: The statement about the aggravation and mitagation (sic) of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process.

A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The court responded, "That is something you cannot consider in making your decision."

The jurors went back to their deliberations and ultimately returned a verdict of death.

On appeal to the California Supreme Court, Belmontes argued that the "unadorned factor (k)" instruction failed to inform the jury of the proper role of sympathy and general character and background evidence. Belmontes also asserted

that Juror Hern's inquiry about the "listing" and "balancing" of mitigating factors reflected an unconstitutionally restrictive understanding of the proper scope of mitigating evidence, which the trial court improperly failed to clarify.

The California Supreme Court rejected these claims, finding the instructions and arguments, taken as a whole, fully and properly defined the scope and nature of the jury's sentencing responsibilities. App. 201a-206a.

Belmontes' petition for certiorari was denied. *Belmontes v. California*, 488 U.S. 1034 (1989).

Federal Proceedings

On November 4, 1994, Belmontes filed an amended petition for writ of habeas corpus in the United States District Court for the Eastern District of California. The amended petition alleged that the trial court's answers to Juror Hern's mid-deliberation questions about the "listing" and "balancing" of mitigating factors led the jurors to misunderstand the proper scope of their sentencing determination, despite the other instructions previously given.[2/]

The district court rejected this claim because the overall instructions were sufficient to dispel any possible confusion and because neither the juror's inquiry, nor the court's comments, suggested a "misunderstanding or repudiation of these instructions." Citing *Boyde*, the district court concurred with the California Supreme Court: "the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities." App. 140a-141a.

On appeal to the Ninth Circuit Court of Appeals,

---

2. After Belmontes' judgment became final, this Court in *Boyde v. California*, 494 U.S. 370 (1990), addressed the constitutional sufficiency of the "unadorned factor (k)" instruction. As was true on direct state appeal, Belmontes raised no claim in federal habeas about the constitutional sufficiency of the factor (k) instruction for purposes of informing the jurors of their ability to consider evidence of his potential future prospects as a life prisoner.

Belmontes again claimed that the trial court's responses to Juror Hern's questions misled the jurors about the proper scope of their sentencing responsibilities. A majority of a three-judge panel reversed Belmontes' penalty judgment. The panel opinion, authored by Judge Reinhardt and joined by Judge Paez, found prejudicial error under the Eighth Amendment based on the instructions regarding the various circumstances the jurors may consider in determining whether Belmontes should receive a sentence of death or life in prison.

Though acknowledging that this Court in *Boyde* had approved the "unadorned factor (k)" instruction, the majority limited *Boyde*'s holding to cases in which the evidence in mitigation [consists solely?]is limited to general information about the defendant's "background and character" offered to "tend to explain why the defendant committed the crime." App. 58a. The instruction was constitutionally insufficient in this case because, according to the panel majority, it failed to inform the jurors they could consider the proffered evidence of Belmontes' former commitment to CYA in determining whether he might adjust well to a life in prison. App. 58a-60a.

The majority concluded that this asserted facial inadequacy of the "unadorned factor (k)" instruction, coupled with the trial judge's informal answers to Juror Hern's and Juror Hailstone's questions during deliberations, was reasonably likely to have misled the jurors to believe they were forbidden from considering Belmontes' evidence offered to show he "would live a productive life if permanently incarcerated in a structured environment." App. 65a.

Judge O'Scannlain dissented, concluding that the majority's reasoning rested on a threefold misapplication of *Boyde*. First, *Boyde's* holding made it "perfectly clear" that all of Belmontes' proffered evidence in mitigation was squarely within the ambit of the "unadorned factor (k)" instruction.[3]

---

3. Judge O'Scannlain also identified other decisions of this Court that would dictate that the jury here was given more than constitutionally adequate guidance in assessing all such evidence. *See Buchanan v. Angelone*, 522 U.S. 269 (1998); *Johnson v. Texas*, 509 U.S. 350 (1993);

Second, given the overall evidence and the uncontested arguments on both sides in this case, any chance of the jury not appreciating the permissible scope of Belmontes' proffered evidence was "pure fantasy." App. 76a. And third, in light of the overall instructions, there could be no reasonable likelihood, as required under *Boyde*, that the jury applied the "unadorned factor (k)"instruction in such a way as to foreclose consideration of any constitutionally relevant evidence. Quoting *Boyde*, Judge O'Scannlain found that any such conclusion would turn the entire proceeding "into a virtual charade." App. 82a (quoting *Boyde*, at 383).

Eight judges dissented from the order denying en banc rehearing, two of them issuing published opinions. Judge Callahan reiterated the concerns expressed by Judge O'Scannlain and added that the majority's reasoning amounted to a belated and unsupportable affront to the California Supreme Court's well-considered conclusion in this case. App. 85a-96a. Judge Bea joined Judge Callahan's opinion and added two additional criticisms: First, Judge Bea objected to the panel majority's suggestion that the jurors should have been instructed to consider "mitigating" evidence bearing on Belmontes' probable future conduct (App. 16a, 59a, 64a), reasoning that any such instruction that characterized specific evidence as "mitigating" would constitute an improper, argumentative comment on the evidence by the trial court. App. 96a-97a. Second, Judge Bea concluded that the panel majority, in finding the "unadorned factor (k)" instruction to be insufficient, had misquoted and mischaracterized the instruction's language. Specifically, Judge Bea noted that the majority had improperly interpreted the instruction's phrase "extenuates the gravity of the crime" to mean "extenuates [Belmontes'] culpability for the crime." App. 58a. Judge Bea reasoned that factors which might "extenuate the gravity of a crime" can encompass "the extent that the criminal shows remorse, repents, or rehabilitates

---

Blystone v. Pennsylvania, 494 U.S. 299 (1990); *cf. Tuilaepa v. California*, 512 U.S. 967 (1994). App. 73a-81a.

himself." App. 97a-99a.

Thereafter, petitioner sought certiorari in this Court. The previous petition for certiorari presented the same two questions raised herein. On March 28, 2005, this Court granted certiorari and remanded the matter to the Ninth Circuit for further consideration in light of this Court's recent decision in *Brown v. Payton*, 544 U.S. __, 125 S.Ct. 1432 (2005).

Proceedings Following Remand

In an opinion issued on July 15, 2005, the same Ninth Circuit panel majority reversed the penalty phase judgment again for the exact reasons set forth in its previous decision. App. 884a-304a. Regarding this Court's grant of certiorari and order for remand for reconsideration in light of *Payton*, the majority simply asserted that *Payton* was inapplicable.

In a few short paragraphs appended to their resubmission of the prior opinion, the majority acknowledged "the similarity of the factual and legal issues" in *Belmontes* and *Payton*. The majority nonetheless found that *Payton* was not controlling because it had been decided under AEDPA. *See* 28 U.S.C. § 2254. Because *Belmontes* is not an AEDPA case, the majority determined that they were free to "reach[] an independent legal judgment as to the constitutionality of the challenged instruction." App. 231a-233a. Justice O'Scannlain again dissented on the same grounds he raised in the earlier decision He further noted that this Court's decision in *Payton* virtually foreclosed any chance of constitutional error here. App. 304a-319a.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decision, once again reversing the death penalty imposed on Belmontes, cannot be reconciled with this Court's *Boyde* and *Payton* opinions. In *Boyde*, this Court held that California's "catch-all" mitigation instruction in capital cases, unadorned factor (k), "directed" the jury "to consider any other circumstance that might excuse the crime,

which certainly includes a defendant's background and character." *Id.* at 382. In *Payton*, this Court recently reaffirmed *Boyde* as controlling precedent with respect to "forward-looking" mitigating evidence of the sort presented in *Belmontes*. In this case, the Ninth Circuit disregarded *Boyde* and *Payton* by finding once again that the factor (k) instruction *does not* adequately inform a jury that it may consider a defendant's background and character.

To be sure, the Ninth Circuit opinion purported to differentiate this case from *Boyde* and *Payton*, but for insubstantial reasons that wholly fail to come to grips with the fundamental holdings of either case. The Ninth Circuit's stingy interpretation of *Boyde* and *Payton*, limiting *Boyde* to its particular facts and limiting *Payton* to its particular procedural posture, treats this Court's opinions in those cases as if they had no force as precedent. The panel's decision constitutes precisely the type of "legal hairsplitting" condemned under *Boyde*.

Indeed, *Boyde* so obviously controls this case that Belmontes did not even assert to the Ninth Circuit, or anywhere else, that the factor (k) instruction prevented the jurors from considering all of his proffered mitigating evidence.

In reaching out to rule for Belmontes on that ground, the Ninth Circuit created a new rule of federal constitutional law. Under the non-retroactivity doctrine of *Teague v. Lane*, however, new rules are inapplicable on federal habeas review. The Ninth Circuit's disregard of the *Teague* doctrine provides still another reason why certiorari is warranted.

ARGUMENT

I.

THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE*

A. California's "Unadorned Factor (k)" Instruction Does Not Preclude Consideration Of "Forward-Looking" Evidence Offered In Mitigation

In *Boyde*, this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the same instruction given in the trial below. Boyde argued "that the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to non-crime related mitigating evidence, because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (original emphasis). This Court rejected Boyde's contention, concluding that California's "catch-all" mitigation instruction was constitutional on its face because it permitted consideration of non-crime-related evidence in mitigation. *Id.* at 380-82. Considering the instruction "standing alone," this Court held that there was no reasonable likelihood "that the jury applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380-81. As was true in the trial here, the jury in *Boyde* had been "directed to consider *any other circumstance* that might excuse the crime, which certainly includes consideration of a defendant's background and character." *Id.* at 382 (original emphasis). This Court in *Boyde* found, therefore, that California's "catch-all" mitigation instruction was constitutional on its face because it permitted consideration of non-crime-related evidence in mitigation. *Id.* at 380-82.

The Ninth Circuit panel majority's attempt to distinguish *Boyde* is flawed from the outset because its initial premise is faulty. By its plain terms, *Boyde* is not limited to cases simply involving evidence of a defendant's "background and character," offered solely to "tend to explain why the defendant committed the crime." App. 292a. To the contrary, *Boyde* acknowledged that when the "factor (k)" instruction is considered in light of the other instructions given (which were also all given in this case), reasonable jurors would in fact realize they were to consider all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*,

at 381-383.

Moreover, there is nothing in *Boyde* to suggest, as the panel majority finds, that *Boyde's* holding would not apply with equal force to the mitigation evidence offered in this case. As Judge O'Scannlain explained in dissent, the evidence supporting Belmontes' argument of future institutional adjustment consisted solely of testimonials regarding his background and character during his CYA commitment, and "*Boyde* makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k)." App. 306a.

Indeed, this Court's holding in *Skipper v. South Carolina*, 476 U.S. 1 (1986) – upon which the majority panel also relies – acknowledges that evidence of a defendant's prior incarceration, offered to show a likely future of conformity in prison, is in fact a form of character evidence: "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character...." *Id.*, at 7.

The panel majority nonetheless reasoned that *Boyde* is inapplicable in this case because Belmontes' evidence was not offered merely "to explain why the defendant committed the crime." App. 292a. In this vein, the majority insists that the language of the catch-all instruction does not encompass "those forward-looking considerations" such as "evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment." App. 293a.

This conclusion is logically untenable and, again, is inconsistent with *Boyde*. As Judge Bea noted in dissent (App. 98a-99a), the panel majority's finding that the "unadorned factor (k)" instruction would not be understood to encompass "forward-looking" evidence rests on an artificially constrictive interpretation of the phrase "extenuates the gravity of the crime." "Extenuate" is defined as "To lessen, to diminish; to weaken...." Webster's Unabridged Dictionary (2nd ed. 1979).

Background and character evidence, offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, while *perhaps* unrelated to the

defendant's *culpability* for his offenses, would nonetheless be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Simply put, if jurors believed a defendant would present no future problems and might somehow *contribute* to society if sentenced to life, they would certainly realize such "extenuating" factors might diminish the "gravity" of the underlying crime for purposes of their sentencing determination. Logically, this instruction would, therefore, inform reasonable jurors that they could consider such evidence in determining whether a judgment of death was warranted or appropriate. As this Court noted in *Boyde*, jurors would naturally consider such background and character evidence as extenuating the gravity of the crime "even though it is not a legal excuse for the crime...." *Boyde*, at 382 n. 5.

This Court's recent decision in *Payton* further confirms that jurors would understand the "unadorned factor (k)" instruction as encompassing evidence bearing on a defendant's likely post-crime behavior or character:

> After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.

Payton, at 1439. In fact, *Payton* found that *Boyde's* interpretation of the "factor (k), was controlling precedent with respect to "forward-looking," post-crime evidence even where the prosecutor repeatedly and improperly argued, with no curative admonition from the trial court, that the jurors were *forbidden* from considering *any* of Payton's "forward-looking" evidence in mitigation. *Id.*, at 1437-39.

Payton's reasoning applies with equal force to the "forward-looking" evidence presented by Belmontes. Background and character evidence, offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, would be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Indeed, such a "forward-looking inquiry *is not independent of an assessment of moral culpability.*" *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (emphasis added).

In its effort to distinguish *Boyde*, the panel below declared that society has no "long held view" about the mitigating effect of a defendant's likely future conduct. Cf., *Boyde* at 382 (recognizing "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.") Therefore, reasoned the panel, "in the absence of a clear instruction on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor." App. 293a.

This pronouncement – that absent a clear instruction on the matter, jurors would not otherwise consider a defendant's future prospects for nonviolent institutional adjustment – is (1) at odds with common sense, (2) inconsistent with this Court's previous views on the matter, and (3) irrational in light of the record. Indeed, this Court in *Skipper* expressly found the consideration of a defendant's prior good behavior in prison, offered as indicative of his character for probable future conduct if sentenced to life in prison, "is an *inevitable* ... element of criminal sentencing that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 5 (emphasis added).

There is virtually no chance any jury would simply disregard such an "inevitable" element of its sentencing determination and make an "elusive" distinction that precludes consideration of a defendant's future adaptability to prison. *Skipper* at 7. There is certainly no chance that the jurors did so

in this case. As Judge O'Scannlain summarized in dissent, the jury heard, without objection, several witnesses testify about Belmontes' prior experience in CYA. Belmontes himself asked the jury for life in prison based on his future prospects and goals. Belmontes' counsel and the prosecution *both* effectively and unambiguously argued that, in light of the evidence of Belmontes' background, the jury could and *should* consider his future prospects of a life in prison in determining the proper punishment. Neither the trial court nor any of the parties or witnesses said anything to counter the very clear message the jury could consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects.

As Judge O'Scannlain noted in dissent, the panel majority's view that the jury nonetheless felt constrained to reject all such evidence and argument necessitates a finding "that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes' lawyer were not smart enough to realize they were all mistaken." App. A 311a. As was true in *Boyde*, reasonable jurors would not have believed the court's instructions somehow "transformed all of this 'favorable testimony [and unrebutted argument] into a virtual charade.'" App. 317a; *Boyde*, at 383-84 (quoting *California v. Brown*, 479 U.S. 538, 542 (1987); *see also Payton*, at 1440 ("like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all").

In sum, the panel majority's finding to the contrary rests on an artificially restrictive interpretation of *Boyde* and an irrational assessment of the record. For these reasons alone, petitioner submits a writ of certiorari should issue in this case.

B. The Ninth Circuit's Interpretation Of *Boyde* Threatens Numerous Other Capital Cases In California And In Other States

The implications of the Ninth Circuit's decision extend beyond the penalty-phase judgment in this case. The decision

could jeopardize the validity of numerous pre-AEDPA death penalty judgments in California. Indeed, in light of the additional "special instruction" given in the trial below (which informed the jurors that mitigating factors were not limited and that any one such factor could suffice in finding a death judgment inappropriate), the majority's decision potentially implicates capital judgments beyond those involving only California's "unadorned (k)."

The "unadorned factor (k)" instruction or an augmented version thereof (such as the additional "special instruction" here), was given in virtually every California capital case from 1978 to at least 1983. *See People v. Easley*, 34 Cal.3d 858, 196 Cal.Rptr. 309, 671 P.2d 813 (1983). The *Belmontes* reasoning would potentially encompass any pending pre-AEDPA case so long as: (1) there was any evidence of satisfactory performance during prior penal or juvenile commitments, (2) there was any evidence or argument about the defendant's future prospects, goals, etc., or (3) there was anything presented about the defendant's character or history which might suggest a conforming or worthwhile future life in prison. With only preliminary research, petitioner has identified some 15 pending pre-AEDPA cases that, like this case, involve the "unadorned factor (k)" instruction and also involve defense evidence of good future prospects in prison.

The harmful effect of the Ninth Circuit's error is not limited to this particular case. Earlier, in *Payton*, the circuit court distinguished *Boyde* on virtually the same grounds as in *Belmontes* and reversed a death judgment because the "unadorned factor (k)" instruction allegedly misled the *Payton* jury to believe they could not consider evidence of "good conduct" after the defendant's arrest for the charged offenses. *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003). Last term, this Court reversed the Ninth Circuit's decision in *Payton* and remanded *Belmontes* for reconsideration in light of *Payton*. *Brown v. Belmontes*, 125 S.Ct 1697 (2005). Following remand, the panel majority disregarded the underlying substance of this Court's *Payton* opinion, which confirms the constitutional sufficiency of the "unadorned factor (k)" instruction with

respect to "forward-looking" evidence, such as that presented in this case. Instead, the panel majority simply seized on the fact that, unlike *Payton*, *Belmontes* is not governed by AEDPA. The majority, therefore, determined that it was unconstrained in employing this newfound interpretation of *Boyde* in pre-AEDPA cases. App. 231a-233a.

In the face of *Boyde*, *Payton*, and this Court's remand order in this case, the Ninth Circuit remains undaunted. Its newfound and unsupportably narrow interpretation of *Boyde* threatens many other valid California death judgments. This Court's intervention and guidance is, therefore, warranted and urgently needed.

C. The Panel Majority's Decision In This Case Illustrates The Ninth Circuit's Fundamental Misunderstanding Of The Controlling Standard For Assessing Constitutional Instructional Error Enunciated In *Boyde*

In assessing whether California's "unadorned factor (k)" instruction violates the Eighth Amendment, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, at 380. In making this determination, the "single instruction . . . may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, at 378.

The panel majority's finding of a "reasonable likelihood" of error underscores the Ninth Circuit's confusion concerning the controlling *Boyde* standard. Indeed, if the overall instructions and arguments in this case were somehow insufficient to inform jurors they could consider Belmontes' mitigating evidence, the "reasonable likelihood" standard set forth in *Boyde* would be all but meaningless.

Assuming *arguendo* the "unadorned factor (k)" instruction was somehow insufficient by itself, the additional instructions in this case clearly informed the jurors that they could consider

any mitigating factor established by the evidence, including Belmontes' likely future institutional adjustment. In addition to the court's directive that the jurors were to "consider all the evidence" in determining the penalty to be imposed, they were given the following "special instruction":

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes.[4/] You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

The panel majority concludes this special instruction "exacerbated" the jury's alleged "confusion" because the second and third sentences of the instruction somehow served to undermine and contradict the plain meaning of the first sentence. App. 294a.

No reasonable juror could have interpreted this special instruction as the panel majority insists. The only reasonable reading of the first sentence is that the jury's determination of mitigating factors was not limited to those expressly enumerated. Logically, the jurors could only conclude they could consider other factors not enumerated. Moreover, the only reasonable interpretation of the directives to "pay careful attention to each of these factors" and "any one of them standing alone may support a decision that death is not the appropriate punishment" is that the jury should consider *any* mitigating factor it found, *whether expressly listed or not.* Jurors would "naturally" and "inevitably" consider Belmontes' "past conduct as indicative of his proper future behavior." *Boyde*, at 382 fn.

---

4. Significantly, the jurors were expressly told, in this same instruction, that they were *forbidden* from considering any *factor in aggravation* beyond those which had been specifically enumerated and defined. App. 313a-314a.

5; *Skipper*, at 5.

As Judge O'Scannlain noted in dissent, in light of this special instruction, there could be "little doubt that the court conveyed the message that the enumerated factors were not the exclusive mitigating circumstances that the jury could consider." App. 314a. As Judge Callahan noted in dissent, any chance of the jury misinterpreting this special instruction as the panel majority speculates "defies logic." App. 89a.

The *Belmontes* majority also finds the trial judge somehow "compounded the problem"with his informal answers to juror questions during deliberations. App. 295a-299a. For the reasons discussed, however, there simply was no "problem" to compound. The jurors were expressly told their consideration of any possible mitigating factors was unlimited.

In any event, during this same informal conference with the jurors, the court directed them to "go over the instructions again with one another." The trial court's directive to review the previous instructions would have cured any possible confusion. *See Weeks v. Angelone*, 528 U.S. 225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves). The previous instructions once again unambiguously informed the jurors that (1) they were to "consider all of the evidence which has been received during any part of the trial," (2) they were to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," and (3) that potential mitigation factors were not limited to those that had been enumerated. Neither the court nor either of the parties ever said anything to suggest that the jurors were limited or in any way restricted from using any mitigating evidence in any way they saw fit. To the contrary, defense counsel and the prosecutor both clearly acknowledged that the jurors could and *should* consider Belmontes' likely future prospects as a life prisoner when making their penalty determination.

In *Boyde*, this Court warned that, although there is a strong policy for accurate sentencing determinations in capital cases, "there is an equally strong policy against retrials years after the

first trial where the claimed error amounts to no more than speculation." *Boyde*, at 380. This Court has also held that a theoretical or abstract claim of improper jury instructions is insufficient to establish constitutional error. *Cupp v. Naughten*, 414 U.S. 141, 147-49 (1973).

The claimed error here is, at best, speculative and theoretical. As in *Boyde*, the "unadorned factor (k)" instruction did not preclude the jurors from considering any evidence in mitigation. Like the evidence in *Boyde*, the evidence here related to Belmontes' character, specifically his character for passive conformity in an institutional setting. As in *Boyde*, the "unadorned factor (k)" informed the jurors they could consider any such evidence. As in *Payton*, there is no reasonable chance that the "factor (k)" instruction, even standing alone, would be misinterpreted to preclude consideration of "forward-looking" considerations based on probable post-crime behavior. *Payton*, at 1439-40.

Moreover, as this Court also observed in *Boyde:*

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde, at 380-81. The panel majority's finding of constitutional instructional error relies entirely on legal hairsplitting, with no regard for a commonsense understanding of the overall instructions and without consideration of what actually occurred in the penalty-phase trial. In light of the overall particulars here, no reasonable juror would have made the "elusive" distinction between past conduct and future behavior suggested by the majority. *Skipper*, at 6-7.

In sum, the circuit court has responded to this Court's remand order with a decision premised on illusory distinctions to *Boyde* and *Payton* and resting on unsupportable factual

analyses. This Court's supervisory intervention is necessary to correct the Ninth Circuit's errant legal judgment in this case and to ensure that such a faulty interpretation of federal constitutional law will not extend to future cases.

II.

THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE V. LANE*, 489 U.S. 288 (1989)[5]

Under *Teague*, a defendant may not receive federal habeas relief based on a new rule of federal constitutional law not "dictated by precedent existing when the judgment in question became final." *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288. Even when the asserted basis of a constitutional violation does not rest on a "new rule," habeas relief is still precluded where the prior precedent upon which it relies is applied in a "novel setting." *Stringer*, at 228; *Butler*, at 414-15. "The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if reasonable jurists may disagree." *Graham v. Collins*, 506 U.S. 461, 476 (1993) (quoting *Stringer*, at 238, Souter, J., dissenting).

Belmontes' judgment became final when this Court denied certiorari of his direct appeal on January 17, 1989. *Belmontes*

---

5. Petitioner did not invoke *Teague* in its brief to the Ninth Circuit, and the panel majority's opinion contains no *Teague* analysis. This is because Belmontes' claim in the district court and on Ninth Circuit appeal concerned solely the propriety of the trial judge's responses to Juror Hern's questions. Indeed, the panel majority acknowledged Belmontes had not challenged the sufficiency of the "unadorned factor (k)" instruction: "Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hern, the Court has held that we must exar claims of instructional error in light of the record as a whole." Accordingly, Petitioner had no opportunity or reason to address the current *Teague* issue until after the panel majority issued its decision. Petitioner *did* invoke *Teague* in his petition for rehearing.

v. California, 488 U.S. 1034 (1989). Prior to that time, there was no basis for reasonable jurists to disagree about the claim at issue because no controlling precedent had ever questioned the federal constitutional sufficiency of California's "unadorned factor (k)" instruction.

Boyde, of course, was issued after Belmontes' judgment became final. But *Boyde confirmed* the constitutional sufficiency of the "unadorned factor (k)" instruction. Reasonable jurists could disagree about Belmontes' entitlement to relief. *See Lambrix v. Singletary*, 520 U.S. 518, 527-528 (1997); *cf. Payton* (denying habeas relief on factor (k) claim because it was at least reasonable for the California Supreme Court to have done so). No rule of this Court extant at the time Belmontes' judgment became final "dictated," in the strict *Teague* sense, the Ninth Circuit's conclusion that California's instruction was constitutionally insufficient.

To be sure, the panel majority relies on *Skipper v. South Carolina*, 476 U.S. 1 (1986). But the *Skipper* holding is too general to "dictate" relief in the context of this case. Unlike *Skipper*, this case involves no exclusion of mitigating evidence. Instead, the present matter involves merely an allegedly ambiguous jury instruction. The panel majority avoided the necessary import of *Boyde* by applying *Skipper* in an improper, unpredictably "novel" manner.

CONCLUSION

Petitioner respectfully asks that this Court once again grant the application for certiorari in this matter.

Dated: October 11, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

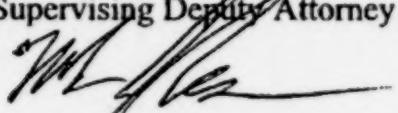
MANUEL M. MEDEIROS
State Solicitor General

DONALD E. DE NICOLA
Deputy Solicitor General

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General



MARK A. JOHNSON
Deputy Attorney General
Counsel of Record

Counsel for Petitioner

drb
SA2001FX0003

APPENDIX

INDEX TO APPENDIX

Order and Amended Opinion, U.S. Court of Appeals for the Ninth Circuit, No. 01-99018, filed July 15, 2003, amended November 20, 2003 — 1a

Order, U.S. Court of Appeals for the Ninth Circuit, No. 01-99018, filed February 5, 2004 — 85a

Memorandum of Opinion and Order, U.S. District Court, Eastern District of California, filed August 15, 2000 — 101a

Opinion, Supreme Court of California, filed June 23, 1988 — 147a

Opinion, U.S. Court of Appeals for the Ninth Circuit, No. 01-99018, filed July 15, 2005 — 230a

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Fernando BELMONTES, Jr., Petitioner-Appellant,	)	No. 01-99018
	)	D.C. No.
v.	)	CV-89-00736-DFL
	)	ORDER AND
Jeanne S. WOODFORD, Warden, for the California State Prison at San Quentin, Respondent-Appellee.	)	AMENDED OPINION

Appeal from the United States District Court
for the Eastern District of California
David F. Levi, District Judge, Presiding

Argued and Submitted
December 5, 2002–Pasadena, California

Filed July 15, 2003
Amended November 20, 2003

Before: Stephen Reinhardt, Diarmuid F. O'Scannlain and Richard A. Paez, Circuit Judges.

Opinion by Judge Reinhardt;
Partial Concurrence and Partial Dissent
by Judge O'Scannlain

COUNSEL

Eric S. Multhaup, Mill Valley, California; Christopher H. Wing,

Sacramento, California, for the petitioner-appellant.

Mark A. Johnson, Deputy Attorney General, Sacramento, California, for the respondent-appellee.

ORDER

The opinion and dissent filed on July 15, 2003 is hereby amended. The clerk shall file the amended opinion and dissent.

OPINION

REINHARDT, Circuit Judge.

In this pre-AEDPA death penalty case, Petitioner Fernando Belmontes, Jr., appeals the district court's denial of his petition for writ of habeas corpus. Because the jury was not instructed that it must consider Belmontes' principal mitigation evidence, which tended to show that he would adapt well to prison and would likely become a constructive member of society if incarcerated for life without possibility of parole, and because there is a reasonable probability that the instructional error affected the jury's decision to impose the death penalty on Belmontes, we grant the petition with respect to the penalty phase. We reject, however, those claims that seek relief from the judgment of conviction and the finding of special circumstances. Accordingly, we affirm the district court's decision in part, reverse in part, and remand with instructions to issue a writ vacating the death sentence.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. The Crime, Its Investigation, and Pretrial Proceedings

On the morning of Sunday, March 15, 1981, 19-year-old Steacy

McConnell telephoned her parents and stated that she was afraid because several people, including codefendant Domingo Vasquez, had threatened her. Several hours later, McConnell's parents arrived at her residence in Victor, California, and found her lying unconscious in a pool of blood. She died shortly thereafter from cerebral hemorrhaging caused by fifteen to twenty blows to her head with an iron bar. Her skull was cracked, and she had defensive injuries on her hands, arms, and feet. The house was ransacked and her stereo was missing.

On the Tuesday preceding the murder, several people, including Vasquez and another codefendant, Robert "Bobby" Bolanos, partied at McConnell's house. Although Bolanos left the residence early Wednesday morning, the party continued until Friday, when Vasquez stole a quantity of "black beauties"--amphetamine pills--from McConnell. Upon discovering the theft, McConnell threw Vasquez and his friends out of the house. The group subsequently discussed their dislike of McConnell.

Police investigation of the individuals who had been present at the party extended to Vasquez, and ultimately to Bolanos, who drove a distinctive black Chevy. The police recognized Bolanos' car as matching the description of the car that had been seen in McConnell's driveway at the time of the murder. The police impounded the car and interrogated Bolanos. Bolanos eventually admitted that he had been involved in the events that led to McConnell's death; he identified Vasquez and Petitioner Fernando Belmontes, Jr., who had not been at the party but who had been visiting him over the weekend of the murder, as his coadventurers. On the strength of Bolanos' statement, the police obtained a warrant and headed South to Ontario, where they arrested Belmontes at his brother's home. Belmontes was nineteen at the time.

Belmontes, Bolanos, and Vasquez were each charged with first degree murder and special circumstances. However, Bolanos soon arranged a deal with the prosecution in which he agreed to

testify against Vasquez and Belmontes in exchange for a guilty plea to second degree burglary and immunity on the murder charge. At Vasquez's preliminary hearing, Bolanos fingered Belmontes as the main assailant. After the preliminary hearing, the trial judge dismissed the special circumstances charge against Vasquez, and he pled guilty to second degree murder. That left Belmontes, who alone proceeded to trial.

B. The Guilt Phase

Bolanos was the principal witness for the state. He testified that on the morning of Sunday, March 15, he and Belmontes drove to Vasquez's residence to hang out. When they arrived, Vasquez was on the phone with McConnell. When Vasquez hung up the phone, he informed them that McConnell would not be home during the latter part of the day. The three were short of cash, and they agreed to burglarize McConnell's residence, steal her stereo, and "clean house." Vasquez's wife, Karrie Lynn, testified that as the men departed through the kitchen, Belmontes grabbed from the counter an iron dumbbell bar, which she used for rolling tortillas.

Bolanos told the jury that the three men drove to McConnell's house in Bolanos' vintage, black car and parked a short distance from the house. According to Bolanos, Belmontes stated that he would approach the house alone, on foot, carrying the metal bar in case he needed to force entry, so that he could gather McConnell's valuables and place them near the door to facilitate a quick getaway, and that the other two should wait for about five minutes and then bring the car around to McConnell's house.

Bolanos testified that the events unfolded as follows: Belmontes left his wristwatch with him, concealed the bar under his jacket, and walked to McConell's residence. Bolanos and Vasquez waited about five minutes, then drove up and backed into McConnell's driveway. Vasquez tried to open the trunk but could not find the right key. Bolanos got out of the vehicle to

assist Vasquez. He heard repeated knocking or banging noises coming from within the house. Bolanos unlocked the trunk and got back inside the car, while Vasquez walked to the front door to assist Belmontes. Shortly thereafter, Belmontes and Vasquez emerged from the back door of the house carrying stereo components. Belmontes was sprinkled with blood on his face, pants, and shoes. Vasquez "looked like he had seen a ghost." Belmontes stated that he had had to "take out a witness" because she was home. He explained that when McConnell heard Vasquez and Bolanos drive up, she looked away from him and he seized the opportunity to hit her with the bar approximately fifteen times.

Lucy Flores, McConnell's neighbor, testified that on the morning of the murder she watched Bolanos' Chevy as it backed into McConnell's driveway. She observed a man get out of the passenger side and try to unlock the trunk. He appeared to be having difficulty, whereupon the driver got out of the car and unlocked it. The driver got back in the car, while the passenger walked towards the front of McConnell's house and met a third man. She did not see where the third man had come from. The two men headed toward the front of McConnell's house. A short while later, she saw them exit McConnell's house from the back door, carrying stereo equipment, which they loaded in the trunk before getting in the car and driving away.

Bolanos testified that, after leaving McConnell's house, the three drove to the nearby city of Galt, where they intended to fence the stereo. En route, Belmontes wiped blood from the metal bar and his shoes. Belmontes threw the bar out of the window as they crossed a bridge over the Mokelumne river.[1/] They went to the home of Manuel Vasquez, Domingo's brother, where Belmontes changed his pants. The three contacted Raul Barron, who met them at the home of Irma Vasquez, Domingo's sister, and purchased McConnell's stereo components from

---

1. Bolanos later led police to the location on the river bank from which the bar was recovered.

them. Barron later testified that he paid $100 for the stereo to a man wearing a baseball cap (Belmontes), who did most of the talking.

Teresa Cobarrubio, Bolanos' girlfriend, testified that Bolanos gave her fifteen dollars from the proceeds of the sale of the stereo. Acting scared, he informed her that he, Belmontes, and Vasquez had burglarized McConnell's residence. The following day, Bolanos and Cobarrubio read a newspaper account of McConnell's murder, and Bolanos related further details of the crime. He told Cobarrubio that he had remained in the car, and that Belmontes had exited the house with blood on his clothes and had stated that he "had to take a witness out."

Bolanos testified that on Monday, March 16, Vasquez called him to advise that he had been questioned by police and did not want to "take the rap" for the murder. Bolanos and Belmontes went to Vasquez's house, where the three conferred. Karrie Lynn Vasquez testified that from the kitchen she overheard Belmontes say that he entered McConnell's house alone and hit her multiple times with the bar before Vasquez joined him in the house.

Barbara Murillo, Belmontes' girlfriend, testified that after the meeting, Belmontes telephoned her and told her that he was "in trouble." He reported that he had gotten into an argument with McConnell at her house, become angry and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep."

Detective Holman, the lead investigator, testified that Belmontes furnished three tape-recorded statements shortly after his arrest. In the first statement, he denied any involvement in the crime. In the second, he admitted the burglary but denied hitting McConnell. In the third statement, he admitted hitting McConnell, but insisted that he only hit her once, and then only at Vasquez's direction. He stated that the single blow he delivered caused McConnell to fall down, whereupon he

dropped the bar and began searching the house for valuables, leaving Vasquez alone with McConnell. Belmontes contended that he did not pay attention to Vasquez's actions during this period and did not observe how McConnell came to have suffered fifteen to twenty fatal blows to her head. Holman also testified that a small drop of blood found on the tongue of one of Belmontes' shoes tested as "type O"--McConnell's blood type.

Dr. Maduros, the pathologist who performed the autopsy on McConnell, testified that she died from cerebral hemorrhaging caused by fifteen to twenty blows to the back left portion of her skull. She had a separate contusion on her right temple, which was caused by a single blow of lesser force that did not lacerate the skin. However, this blow alone would not have caused death and, if it had been the first, it would not likely have caused unconsciousness. Injuries to McConnell's arms, hands, legs, and feet evidenced a struggle. According to Dr. Maduros, there would have been sounds "like a cracked pot" associated with the blows that fractured McConnell's skull, and blood would have splattered in a manner consistent with the blood patterns found on the door jambs in her house.

Belmontes testified in his own defense. He insisted that Vasquez dealt the fatal blows while he, Belmontes, searched the back part of the house for something to take. Belmontes recounted that he and Bolanos had gone over to Vasquez's house, and that when Vasquez mentioned that McConnell would not be home, they decided to steal her stereo. Although they expected McConnell to be away, the plan was that Belmontes would go to the door in case she turned out to be home; because of the unhappy denouement of her party a few days earlier, McConnell would become angry and suspicious if she saw Vasquez or Bolanos at her door. Although Belmontes had met McConnell a few times in the past, she did not know that he was a friend of Vasquez and Bolanos.

Belmontes' version of events was consistent with Bolanos' up to the point of who struck the blows that killed McConnell.

Belmontes agreed that Vasquez and Bolanos stayed in the car while he walked to McConnell's front door. He stated that Vasquez had given him the metal bar to use to break a window; but that he concealed it in his sleeve. According to Belmontes, he knocked at McConell's door and, to his surprise, she answered. As soon as he found out that she was home, he abandoned his intent to burglarize her residence. He told her that he was hitchhiking and had stopped by because it was raining. McConnell invited him in. She noticed a bulge in his sleeve and asked what it was. He showed her the bar and explained that he had it because he was hitchhiking. He used McConnell's bathroom and then stood by the table and talked to her while she ironed clothes. McConnell told him that she was having problems with some people and asked him if he knew Domingo Vasquez. Belmontes said that he had met him.

Belmontes' testimony continued: Five minutes after he entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Belmontes followed behind her and was placing the bar back up his sleeve when Vasquez rapped on the door. Under Belmontes' version, when Bolanos' car backed into the driveway, Vasquez would have had to proceed immediately to the front door; he would not have had time to go to the trunk of the car to attempt to open it.

According to Belmontes, after he knocked at the door to McConnell's house, Vasquez pushed it open, saw McConnell, and ordered Belmontes to "hit her." Belmontes followed Vasquez' directive and, using a backhanded sweeping motion, struck McConnell on the side of her head with the bar. She fell to the floor. Belmontes dropped the bar, ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room. He did not enter the master bedroom. Upon returning to the front of the house, he observed Vasquez standing over McConnell and holding the metal bar. He did not see Vasquez hit McConnell or hear any blows landing because he was not paying attention. He could not explain the presence of defensive bruises and contusions on

McConnell's hands, arms, and feet.

The rest of Belmontes' testimony is, with one significant exception, consistent with Bolanos': Belmontes and Vasquez gathered the stereo components and exited from McConnell's back door. They loaded the stereo components into the trunk. Vasquez got in the back seat, Belmontes rode shotgun, and Bolanos drove. According to Belmontes, while en route, Vasquez handed him the steel bar, which had flesh and hair residue on it, and then Vasquez (not Belmontes) stated that he had had to take out a witness. Belmontes, still wearing his gloves, wiped blood off the bar and set it down on the floorboard. He was uncertain whether there was blood on his pants when he left McConnell's house; he said that the blood might have come off the bar when he placed it on the floorboard. He denied having wiped any blood off of his shoes and asserted that Bolanos and Vasquez told him to throw the bar out his window into the river, and that he complied.

Belmontes concluded his testimony by stating that the three drove to Manuel Vasquez' house, where he changed into a pair of Manuel's pants. Manuel contacted Raul Barron, whom they then met at Irma Vasquez' house. Barron bought the stereo for $100. Bolanos, Vasquez and Belmontes divided the money, bought some beer, and drove to the home of an acquaintance to purchase narcotics.

Belmontes' girlfriend, Barbara Murillo, testified that six months after the murder, she ran into Cobarrubio at the Grape Festival. Murillo believed that Belmontes was the murderer. However, when she asked Cobarrubio for further details about the crime, Cobarrubio claimed that Belmontes had been "set up" because he had no backup in the area, whereas Vasquez had a network of local friends.[2/]

---

2. Cobarrubio testified that she recalled running into Murillo at the Grape Festival. Murillo had asked her whether she thought Belmontes "might have been set up." Cobarrubio replied: "Well, he might have."

After three hours of deliberation, the jury convicted Belmontes of first degree murder with special circumstances. It also made special findings that Belmontes was the actual killer and that he had the specific intent that death occur.

C. The Penalty Phase

At the penalty phase, the prosecution introduced minimal aggravating evidence. Detective Holman authenticated two autopsy photographs depicting McConnell's wounds. William Cartwright, manager of a motel in Ontario, California, testified to an incident in early 1979 in which an individual named Rudy met Belmontes at a motel and attempted to sell him a .32 caliber automatic handgun that he had acquired in a burglary. Belmontes reportedly examined the loaded weapon, cocked the trigger, pointed it at Rudy and stated, "I've got it now. Why buy it?" Rudy left the premises and Belmontes retained the weapon.

Steven Cartwright testified that he had a conversation with Belmontes in February 1979 in which Belmontes alluded to the fact that some people were upset with him. As Belmontes talked, he indicated that he had a gun in his belt by slapping his side, and he stated that he was not concerned because he had all the protection he needed. Ron Cutler, a California Youth Authority ("CYA") counselor, testified that he once observed Belmontes swinging a chair as if he were about to hit another ward, but Cutler was able to intervene before a fight ensued. On cross examination, he admitted that Belmontes was significantly smaller than the other youth.

Barbara Murillo testified about a domestic violence incident that occurred when she asked Belmontes to move out of their shared apartment and to give her his keys so he could not come back. During the fight that ensued, Murillo, who was four months

---

Cobarrubio testified further that in fact she had no information from any source that Belmontes had been set up but answered as she did because she felt sorry for Murillo.

pregnant with Belmontes' second child, grabbed a "file" for protection and attempted to phone the police, but Belmontes cut the telephone cord with his knife. Belmontes pushed her and hit her on the head, at one point causing her to drop their infant daughter. He tried to choke her, but they were separated by friends who were present. Murillo fled through a window, but Belmontes dragged her back to the vicinity of the apartment. A neighbor eventually summoned the police, who arrived as Belmontes was leaving the premises.

Finally, the prosecution and defense stipulated that Belmontes entered a plea of no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter. The court refused to allow the prosecutor to introduce evidence that Belmontes had actually murdered the victim, Jerry Howard.[3/] Consequently, the jury never heard any details of the murder or Belmontes' alleged role in it.

Belmontes' mitigation presentation was also limited in scope, focusing on two themes: his family and personal history and his capacity for rehabilitation and positive institutional adjustment. It was primarily the latter theme that defense counsel pressed upon the jury.

Belmontes' family history was one of poverty and violence. His maternal grandfather, Michael Salvaggio, testified to his daughter's unhappy marriage to Belmontes' father. Salvaggio recounted that his daughter was sixteen when she ran away from home and married Belmontes' father, who was unemployed, refused to support his family, drank to excess, and beat her. Salvaggio said that he was "very close" to his grandson until Belmontes was about thirteen but after that had little contact

---

3. The prosecutor's proffer included testimony from an eyewitness who saw Belmontes shoot Howard, a CYA counselor to whom Belmontes had confessed that he did so, another individual who saw Howard get into a car with Belmontes on the evening he was killed, and the police officer who found the murder weapon at Belmontes' house.

with him. However, Salvaggio continued, when Belmontes was sixteen and his grandmother lay dying in the hospital, he visited her every day; he also attended her funeral.

Carol Belmontes confirmed that her marriage to Belmontes' father was unhappy. Fernando Belmontes, Sr., was a violent alcoholic who "wouldn't ever work," and who beat her, breaking her arm on one occasion and stabbing her on another. Belmontes was ten years old when the marriage broke up. Mrs. Belmontes remarried. That marriage broke up five years later, when Belmontes was about fifteen, after which he became difficult to control. Belmontes had not lived with his mother since he was committed to the CYA two years before McConnell's murder. He had a younger brother and sister, to whom he was "very close."

Belmontes again testified on his own behalf. He recounted that he had a poor relationship with his father, who often came home drunk and hit his mother. He did not like school and stopped attending in the ninth grade. He wanted to get a job so that he could help his mother pay the bills. Although he described his youth as "pretty hard," he twice stressed that he did not want to "use it as a crutch."

Robert Martinez, a close friend of Belmontes since their early teens, testified that he and Belmontes spent a great deal of time together, usually working on Martinez's low-rider car. Belmontes served as best man at Martinez's wedding and was someone he could turn to for advice and support when he argued with his wife. Martinez also testified that he felt Belmontes was not a violent person. However, with defense counsel's consent, this testimony was struck following an objection from the prosecutor, who argued that if this evidence was admitted, the prosecution should be allowed to impeach Martinez with the evidence regarding the Jerry Howard murder.

More important by far was the second mitigation theme--that Belmontes could lead a positive, constructive life if confined

within an institutional setting. The state agrees that Belmontes' counsel, John Schick, presented "substantial evidence" in support of this theme in the form of a series of witnesses who testified to Belmontes' behavior and achievements during his prior CYA incarceration and to the likelihood that he would make positive contributions to the welfare of others if his life was spared. Belmontes himself testified that he was in the custody of the Youth Authority from early 1979 until November 1980, four months prior to the crime. While at the CYA, he was employed on the fire crew at the Pine Grove Camp for one year, during which he worked his way up from last man to number two, a position of leadership and responsibility. Belmontes also testified that during his incarceration he became involved in the M-2 Christian sponsorship program. He admitted that he initially entered the M-2 program as a way to get out of camp, but he explained that he was touched by the decency of his M-2 family, the Haros, and so gradually became curious about Christianity and embraced it.

Belmontes continued by saying that he was paroled from the Youth Authority after serving his maximum sentence; that he stayed at the halfway house in Oakland for two weeks and then went to Southern California for a short period, returning with Murillo to the Lodi area to take a job with the forest service; and that he subsequently moved to Lodi in part so that he could be close to the Haros. However, outside of the institution, Belmontes said, he had trouble maintaining his religious commitment and "started going back to [his] old ways," in part due to "pressure on the streets." At the time of trial, he had not abandoned his religious beliefs but felt that he was no longer "dedicated one hundred percent" to his religious commitment. He testified that he would hope to make positive contributions to society if he were ordered incarcerated, though he had little specific idea of how he might do so.

The Reverend Dale Barrett, chaplain at the Youth Authority's Pine Grove Facility, testified that he knew Belmontes from his participation in the M-2 Christian sponsorship program, which

matched a local church-going family with a ward, who would be permitted to leave the facility to visit with the family at specified times each week. Barrett explained that Belmontes was matched with Beverly and Fred Haro and participated in the program for about a year. In addition, Belmontes was baptized during his stay in the CYA. Only a small percentage of program participants who made a serious commitment to Christianity were baptized. Barrett felt that, unlike the many wards who stayed in the program only to get out of camp and manipulate favors from the sponsoring families, Belmontes had not "conned" them. Barrett testified that although he personally believed in the death penalty, he did not think Belmontes deserved to die because he was a "salvageable" person with "a lot of extenuating circumstances in his life." Barrett was of the view that Belmontes' involvement in the McConnell murder was attributable to "the enormity of the peer pressure and the kind of sociological circumstances that were part of his life," and he thought that if Belmontes were granted a life sentence, he would make positive contributions to prison life through his involvement with the prison ministries.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and the Northern California Director of the M-2 program, testified that he helped place Belmontes in a halfway house in Oakland upon his release from the CYA. Miller stated that, at the time, he felt "a little bit doubtful" about Belmontes' ability to lead a productive life outside of a highly structured environment, like prison. Miller testified that Belmontes stayed at the halfway house for only two weeks before moving to the Lodi area to take a job with the forest service. During those two weeks, however, Belmontes returned to Preston on a few occasions to speak to wards about what life was like "on the outside." Miller described Belmontes (and his message) as well-received by the CYA wards, and he believed that if Belmontes were committed to prison for a life term, he would be good at counseling other prisoners not to make the same mistakes that he had. Miller was enthusiastic about working with Belmontes in this capacity and stated that Belmontes "definitely would be

used in the prison system for this kind of activity" because he related well to other prisoners, especially those who shared his ethnic background, and because these kinds of programs were "at the present time the only solution" to the troubling problem of recidivism among prisoners.

Finally, several witnesses offered evidence with respect to Belmontes' conversion to Christianity, which occurred during his first CYA incarceration, and his failure to maintain his religious commitment upon his release. Martinez's wife Darlene, a born-again Christian, testified that she had known Belmontes for six or seven years and considered him a close friend. Darlene recounted that when Belmontes visited them after his release from the Youth Authority, he told her that he was a born-again Christian. He also mentioned his disputatious relationship with his girlfriend, Murillo, and mentioned that he was planning to move in with her. During the conversation, Belmontes expressed concern that Murillo was not a Christian, and he worried that he would be unable to maintain his Christian faith on his own.

Beverly and Fred Haro, Belmontes' M-2 sponsors and members of Reverend Barrett's church, testified that Belmontes spent Wednesday evenings and weekends with them for almost a year. They felt they had a good relationship with Belmontes, who attended church with them. They treated him like their own son, and he opened up to them and was a good influence on their own teenage son. They saw him several times after his release from the CYA. Fred Haro stated that he had "compassion as a son" for Belmontes and that Belmontes had been genuine in his commitment to the M-2 program and his affection for his sponsors. Beverly Haro felt that Barbara Murillo was a "definite negative factor" in Belmontes' life.

At the conclusion of the evidentiary stage, the court permitted Belmontes to address the jury personally during closing arguments. Belmontes stated that he did not think that his difficult childhood excused his role in the McConnell murder.

However, he explained that he could not handle the pressures of life outside of an institution, and he asked the jury to give him "an opportunity to achieve goals and try to better [him]self." Belmontes' attorney similarly stressed that Belmontes could not "make it on the outside." He argued that Belmontes had had a hard life but still retained his humanity. He characterized Belmontes as someone who thrived in a structured environment--as evidenced by his accomplishments while in the CYA--and asked the jury to spare Belmontes' life on the ground that he would make positive contributions if allowed to live out his natural life in prison.

The judge instructed the jury according to the then-standard model jury instructions, which directed the jury to consider as mitigating evidence the defendant's age, criminal history, and "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In addition, the judge read a portion of a supplemental instruction requested by the defense, which stated that the jury should view the statutory factors "merely as examples of some of the factors" that it could consider, that the jury "should pay careful attention to each of these factors," and that "any one of them standing alone" could support a life sentence. The trial judge refused to read the most important part of the requested instruction, which stated: "[Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence." The jury was not informed that it should consider mitigating evidence bearing on Belmontes' probable future conduct if sentenced to life in prison without the possibility of parole. Shortly after Belmontes' trial, the California legislature revised the model jury instructions to make clear that the jury must consider any aspect of the defendant's character or record offered as a basis for a sentence less than death, "whether or not related to the offense for which he is on trial." CALJIC 8.85(k) (6th ed.1996).

The jury deliberated for a day and a half before reaching a

verdict. On the first day, after several hours of deliberations, the jury sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought back to the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can." The trial judge refused to tell the jurors what would happen if they could not agree.

The trial judge emphasized that if the jurors "[went] over the instructions again with one another," they might find it easier to reach agreement. The jurors then asked the judge to clarify the instructions on the weighing of the aggravating and mitigating factors. One juror asked the trial judge whether the jury was supposed to take each listed (i.e., statutory) factor, decide whether it was aggravating or mitigating, and then "balance the sheet." Rather than instruct the jurors that it was their duty to consider and, if appropriate, give effect to, all of the mitigating evidence presented by the defendant, whether comprehended by one of the statutory factors or not, the trial judge responded simply, "That is right," even though no statutory factor comprehended the element of rehabilitation. Shortly thereafter, another juror asked whether it was possible for Belmontes to receive psychiatric treatment while in prison. The trial judge responded, "That is something you cannot consider in making your decision." Following this colloquy, the jury returned a death sentence.

D. Post-Trial

The California Supreme Court affirmed Belmontes' conviction and sentence in 1988, People v. Belmontes, 45 Cal.3d 744, 248 (1988), and the U.S. Supreme Court denied certiorari in early 1989. Belmontes then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, which was held in abeyance while Belmontes exhausted state remedies.

Belmontes filed a state habeas petition and received a stay of execution from the California Supreme Court. The California courts summarily dismissed Belmontes' petition, refusing him compulsory process and denying him an evidentiary hearing on any of his claims. The California Supreme Court finally denied relief in 1992.

In 1993, proceedings on the federal writ commenced before a magistrate judge. In 1996, he denied Belmontes' request for an evidentiary hearing on certain claims but granted his motion to expand the record to include depositions, declarations, and reports submitted by the parties. The parties filed cross motions for summary judgment. In 2000, the district court withdrew the referral from the magistrate judge and, in August of that year, denied relief on all claims except six that had not yet been briefed. The court referred those six claims to the magistrate judge for a recommendation. In January 2001, the magistrate judge recommended denying the outstanding claims, and in May 2001, the district court adopted the magistrate's findings and recommenda-tions, denied the petition, and entered judgment against Belmontes. The district court issued a Certificate of Appealability fo: fifteen constitutional claims. This appeal timely followed.

II. STANDARD OF REVIEW

Because Belmontes filed his habeas petition prior to AEDPA's effective date, we apply pre-AEDPA standards of review. Woodford v. Garceau, 123 S.Ct. 1398, 1401 (2003). State court factual findings are presumed correct unless one of eight enumerated exceptions applies. See 28 U.S.C. § 2254(d) (1994). The application of law to historical facts is reviewed de novo. Thompson v. Borg, 74 F.3d 1571, 1573 (9th Cir.1996).

III. GUILT PHASE ISSUES

A. Giglio and Napue Claims

Belmontes alleges that the state deprived him of due process by failing to disclose that Bolanos had several misdemeanor charges and that the prosecutor personally helped him achieve favorable dispositions on those charges. In a closely related claim, he contends that the prosecutor violated due process by failing to correct Bolanos' false and misleading testimony that he had never been "busted" before his arrest for the McConnell murder.

1. Factual Background

On the Wednesday morning before the murder, Bolanos drove into a traffic signal on his way home from McConnell's house. A police officer witnessed the accident. After flunking a field sobriety test, Bolanos was taken into custody and charged with various misdemeanor driving offenses, including DUI and hit-and-run.

One week later, Bolanos was charged with first degree murder for his role in the McConnell murder. He soon entered into an agreement in which he pled guilty to second-degree burglary in exchange for testifying against Vasquez and Belmontes. He was granted immunity for his testimony and his sentence was left to the court's discretion. He received no explicit promises of leniency from the prosecution.

After Bolanos pled guilty to the burglary, he obtained a string of unusually favorable dispositions on several traffic offenses. First, with respect to the DUI/hit-and-run charges, his attorney appeared in municipal court along with Clark Sueyres, the district attorney who was prosecuting the case against Belmontes. On Sueyres' motion, the charges were dismissed in the interest of justice. Next, later that year, Bolanos was cited for driving an unregistered vehicle and driving with a suspended license. He was allowed to plead guilty to the lesser charge of driving without a valid license and assessed a $100 fine; the court dismissed the unregistered vehicle charge. The following April, Bolanos was again cited for driving an unregistered

vehicle, driving with a suspended license, operating an unsafe vehicle, and driving with worn tires. Again, Sueyres personally asked the municipal court to dismiss the charges in the interest of justice. Bolanos, once again, pled guilty to driving without a valid license and paid a $75 fine. None of these matters was disclosed to the defense.

At trial, Bolanos admitted on cross-examination that he was testifying under court order in exchange for a grant of immunity and that he would face a murder charge if he refused to testify. However, Schick's efforts to impeach Bolanos were hampered by the fact that Bolanos continually minimized both his own culpability and the benefits he received from the prosecution in exchange for his testimony. For example, Bolanos told the jury that his motive in testifying was "to tell the truth," and he stated that because he "wasn't even around when the crime happened," he did not view the grant of immunity as a particular favor.

In addition, Bolanos was less than truthful when he testified about his prior contacts with law enforcement. When Schick questioned Bolanos about prior inconsistent statements that Bolanos had made to the police, Bolanos explained them by saying that he had made mistakes out of nervousness because it was "the first time I got busted." In fact, Bolanos had been "busted" twice before. In addition to the DUI/hit-and-run incident, Bolanos had previously been arrested for gun possession by Detective Holman, the same officer who arrested him for the McConnell murder. The arrest generated formal criminal charges, and Bolanos was sentenced to thirty days in a juvenile facility, of which he served fifteen.

2. Giglio Claim

The prosecution has an affirmative duty to turn over to the defense all evidence favorable to the accused, including impeachment evidence. Kyles v. Whitley, 514 U.S. 419, 432 (1995); Giglio v. United States, 405 U.S. 150, 154 (1972). The failure to disclose favorable evidence violates due process when

the evidence is material. United States v. Bagley, 473 U.S. 667, 678 (1985); Singh v. Prunty, 142 F.3d 1157, 1161 (9th Cir.1998). Evidence is material if there is a reasonable probability that, had it been disclosed to the defense, the outcome of the trial would have been different. Bagley, 473 U.S. at 682. A reasonable probability occurs when the suppression "undermines confidence in the outcome of the trial." Kyles, 514 U.S. at 434 (internal quotation marks omitted).

Belmontes argues that the prosecutor violated due process by failing to turn over material impeachment evidence consisting of the existence and unusual disposition of Bolanos' misdemeanor traffic offenses. The state responds that the prosecutor had no duty to disclose this evidence because the misdemeanor violations were not mentioned in the plea agreement and were not dismissed as consideration for Bolanos' testimony against Belmontes. In support of this argument, the state cites the deposition testimony of both Bolanos and his attorney to the effect that they did not perceive the dismissal of the traffic offenses as related to the immunity deal.

The state's argument is without merit. We have held that when the state relies on the testimony of a criminal informant, it has an obligation to disclose "all information bearing on that witness's credibility," including "the witness's criminal record ... and any information therein which bears on credibility." Carriger v. Stewart, 132 F.3d 463, 480 (9th Cir.1997). We further emphasized the importance of this rule in Benn v. Lambert, in which we held that "the state cannot satisfy its Brady obligation to disclose exculpatory and impeachment evidence by making some evidence available and asserting that the rest would be cumulative. Rather, the state is obligated to disclose all material information casting a shadow on a government witness's credibility." 283 F.3d 1040, 1057-58 (9th Cir.2002) (internal quotation marks omitted). Here, the fact that the prosecutor personally appeared in municipal court to argue for favorable dispositions of Bolanos' mis-demeanor traffic

offenses casts a shadow on Bolanos' credibility regardless of whether such intervention was mentioned in the plea agreement or offered as consideration for Bolanos' testimony. Had defense counsel known about the existence and disposition of the misdemeanor offenses, he could have impeached Bolanos by showing that he had a motive to say what the prosecution wanted to hear in hopes of obtaining a lighter sentence on his plea to second degree
burglary. Even though Bolanos was not explicitly promised leniency, the fact that the prosecutor helped Bolanos obtain dismissals or reduced punishments on his traffic misdemeanors makes it more likely that he would intercede on Bolanos' behalf when it came time for sentencing on the burglary charge. Thus, the evidence was clearly relevant and admissible for purposes of impeachment, and the district attorney should have disclosed it.

Nevertheless, we hold that Belmontes' Giglio claim fails because, under the particular facts and circumstances of this case, the undisclosed evidence was not material. This case presents different circumstances from those in Benn, in which we held that the prosecutor's dispensation of similar favors on behalf of his star witness--including quashing a traffic ticket, dismissing a burglary charge, and postponing the filing of an arrest warrant until after Benn's trial--were material benefits. Id. In Benn, we held that the failure to disclose these benefits necessitated a new trial, even though the prosecutor disclosed that he had made a deal with the informant to seek a reduced sentence in exchange for his testimony against Benn, and defense counsel impeached the informant on this point. Id.

Aside from the fact that the undisclosed benefits in Benn may well have been more substantial than those at issue here, Benn is distinguishable for three reasons. First, Bolanos was actually involved in the McConnell murder, whereas the informant in Benn was a jailhouse snitch. Evidence that a jailhouse snitch received material benefits from the prosecution is especially important because without that evidence the informant

masquerades as a disinterested observer. See United States v. Bernal-Obeso, 989 F.2d 331, 333-34 (9th Cir.1993) (describing practice of relying on criminal informants as "fraught with peril"). In this case, however, Bolanos was cross-examined extensively as to his role in the crime and the details of his immunity agreement, so the jury could not possibly have viewed him as disinterested. Second, the impeachment evidence that was disclosed in Benn was relatively trivial; although the informant received sentencing leniency in his unrelated case, the leniency saved him only thirty-five days of jail time. Benn, 283 F.3d at 1057. Accordingly, "the number and nature of the undisclosed benefits was such that they would have impeached [the witness] more effectively" than the benefits that were disclosed. Id. at 1058. By contrast, in the present case the impeachment evidence that was disclosed was substantial: an agreement allowing Bolanos to plead guilty to second-degree burglary and receive immunity for the murder in exchange for his testimony. Finally, in Benn the prosecutor effectively downplayed the importance of the impeachment evidence in his closing argument. Id. (quoting prosecutor's argument that "[t]he reward he got was that in a 6 to 12 month sentence, he got six months instead of nine months. Big reward."). In this case, however, the prosecutor argued that the jury should view Bolanos' testimony critically, and the jury was so instructed. For these reasons, we conclude that Benn does not control our analysis here.

Here, the undisclosed benefits were not material because there is not a reasonable probability that the outcome of the trial would have been different if defense counsel had known about them. In making this judgment, we realize that Belmontes need not pass a sufficiency of the evidence test. Kyles, 514 U.S. at 434. "However, our fundamental concern remains whether there exists a reasonable probability that given disclosure of the evidence of benefits to[the witness], one or more members of the jury would have viewed [his] testimony in a different light." Singh, 142 F.3d at 1163. In this case, Bolanos was impeached with his immunity agreement, including the fact that the charges

filed against him were substantially lower than the evidence would have warranted. The withheld evidence would not have added much, if anything. Moreover, Bolanos' testimony was corroborated by that of several other witnesses, including disinterested witnesses like Lucy Flores and Barbara Murillo, who were not involved in the crime or related to the codefendants. Belmontes' testimony to the contrary was uncorroborated and did not hold up well under cross-examination. Had Bolanos' testimony been less well-supported or the undisclosed benefits been greater, or had the prosecutor not urged and the judge not instructed the jury to view his testimony with suspicion, we might conceivably have reached a different conclusion. Nevertheless, given the extent of the corroborating evidence, the relative unimportance of the undisclosed benefits as compared to those that were disclosed, and the nature of the prosecutor's statement, we cannot say that the jury would have viewed Bolanos' testimony in a different light had it known that the prosecutor had helped him to quash his misdemeanor traffic offenses or obtain lighter punishment on them. In short, the undisclosed benefits do not undermine our confidence in the verdict. In these circumstances, we hold that the withheld evidence was not material, and the claim must, therefore, be denied.

3. Napue Claim

Belmontes also argues that the prosecution violated his due process rights by failing to correct Bolanos' false assertion that he had never been "busted" before. The prosecutor has an independent, constitutional duty to correct testimony he knows to be false. Napue v. Illinois, 360 U.S. 264, 269-70 (1959); N. Mariana Islands v. Bowie, 243 F.3d 1109 (9th Cir.2001). If there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury," the conviction must be set aside. United States v. Agurs, 427 U.S. 97, 103 (1976).

The state argues that the prosecution had no duty to correct the

record because defense counsel was notified of the drunkdriving arrest at a pretrial hearing. Whether defense counsel is aware of the falsity of the statement is beside the point. The state overlooks the fact that the prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of "the free standing constitutional duty of the State and its representatives to protect the system against false testimony." Bowie, 243 F.3d at 1118. Therefore, regardless of whether defense counsel should have known that a state witness testified falsely, "[a] prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' Napue, 360 U.S. at 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217, requires [him] to act when put on notice of the real possibility of false testimony." Id.

The state also contends that the prosecution had no duty in this case because the word "busted" is ambiguous, and therefore Bolanos may not have testified falsely at all. We do not find the word "busted" to be ambiguous. See Webster's New World Dictionary 189 (3d college ed.1988) (defining "bust" as "to arrest"). In this case, the prosecutor knew that Bolanos had been "busted" twice before: once for DUI/hit-and-run and once for gun possession. He had an independent duty to correct the false testimony and elicit the truth.

If there were any reasonable likelihood that Bolanos' false testimony could have affected the judgment of the jury, we would be compelled to grant the petition with respect to this claim. Belmontes argues that a reasonable likelihood exists, pointing to the fact that the "first time I got busted" comment arose at a crucial part of defense counsel's cross-examination. Bolanos used this false statement to explain his prior inconsistent statements on two critical points: the length of time Vasquez spent in the house and the alleged knocking noise that Bolanos heard when he got out of the car to open the trunk. He stated that he was nervous when he made the prior inconsistent statements to the officer because he had never been busted before. The testimony that was inconsistent was important

because it tended to incriminate Belmontes and exculpate Vasquez by suggesting that McConnell was killed before Vasquez entered the house; it also was not directly corroborated by any other witness. Conceivably, if the jury knew that Bolanos had lied when trying to explain his prior inconsistent statements on these points, it could have concluded that Bolanos was lying about the timing and the knocking noise, either to please the prosecution or to protect Vasquez. The jury then would have been more likely to believe Belmontes' testimony that Vasquez was the actual killer.

Ultimately, however, we do not believe that Bolanos' false testimony regarding the absence of prior arrests could have affected the judgment of the jury. As we explained, his testimony regarding the events surrounding the murder was in most respects corroborated by independent witnesses. Furthermore, the most damaging testimony of the trial came from Belmontes himself. On cross-examination, Belmontes conceded that for his version of events to be true, Vasquez would have had to have come directly from the car to the door without attempting to open the trunk, and there is direct evidence to the contrary from a disinterested eyewitness. Moreover, Belmontes refused to say that he had seen or heard Vasquez hitting McConnell, and he could not explain how Vasquez would have had enough time to both murder McConnell and ransack the front bedroom. Finally, Belmontes, but not Vasquez, had blood sprinkled on his clothes and shoe. On this record, we hold that there is no reasonable likelihood that Bolanos' false testimony that his arrest in connection with the McConnell murder was "the first time I got busted" would have affected the judgment of the jury. We therefore deny relief on this claim.

B. Conflict of Interest

Belmontes contends that he was deprived of due process and the effective assistance of counsel due to a conflict of interest arising from Schick's multiple prior representations of Vasquez. See

Cuyler v. Sullivan, 446 U.S. 335 (1980). At the heart of the claim is the allegation that Schick, because of the conflict of interest, did not offer evidence of Vasquez's violent criminal history in support of his defense theory that Vasquez was the actual killer.[4/] Belmontes argues that this evidence was relevant and admissible for two purposes: first, to show that Vasquez was, in fact, the actual killer; and second, to impeach Bolanos' credibility by showing that his fear of retaliation by Vasquez caused him to place the blame on Belmontes, rather than on the true murderer.

1. Factual Background

During pretrial proceedings, Vasquez's attorney brought a motion to recuse Schick as counsel for Belmontes. The motion was based on the fact that Schick's law firm had represented Vasquez in a 1979 murder case; Vasquez's attorney feared that Schick had confidential information that he would use against Vasquez as part of his defense theory that Vasquez was the actual killer.[5/] Shick opposed the motion and filed a declaration in which he stated: (1) the attorney who represented Vasquez in 1979 had since left the firm; (2) the case against Vasquez was dismissed prior to trial; (3) he himself had acquired no confidential communications from Vasquez; and (4) the case file had been

---

4. Belmontes also argues that the trial judge independently violated his due process rights by failing to inquire adequately into the conflict and failing to advise Belmontes about the nature and consequences of the conflict. We do not address this claim because Belmontes cannot prevail on it without showing that Schick labored under an actual conflict of interest that adversely affected his defense, a showing Belmontes cannot make for the reasons explained hereafter. Mickens v. Taylor, 535 U.S. 162 (2002) (extending Cuyler burden of proof to situations in which trial judge failed to inquire into conflict about which he knew or reasonably should have known).

5. Earlier, Vasquez's counsel had successfully moved to recuse Schick's investigator. This investigator had previously worked on Vasquez's 1979 murder case, and at the time of Belmontes' trial he worked part-time in the public defender's office, which represented Vasquez in the McConnell murder.

destroyed eight months earlier. The trial judge held a hearing and, based on these facts, denied the motion. The judge asked Belmontes if he wished to retain Schick as his lawyer, knowing that Schick's firm had previously represented Vasquez. Belmontes said that he did.

In postconviction proceedings, Belmontes' attorneys learned that Schick's connection to Vasquez was, in fact, much more extensive than he had disclosed to either Belmontes or the trial court. Prior to entering private practice, Schick and the members of his criminal defense firm had worked at the local public defenders' office. There, Schick and the members of his firm represented Vasquez on three occasions in addition to the 1979 murder charge. In August 1974, Schick had himself represented Vasquez on a gun possession charge; he had helped Vasquez negotiate a guilty plea. In November 1974, Patrick Riddle, a partner in Schick's law firm, had represented Vasquez on a rape charge.[6] In January 1976, Douglas Jacobsen, the third partner in Schick's firm, had represented Vasquez in a purse-snatching case that went to jury trial. Schick did not notify Belmontes or the court of these incidents of representation even though he remembered them at the time of the recusal motion.

In 1994, Schick signed another declaration with respect to the conflict of interest claim. In that declaration, he averred that at the time of the recusal motion, he saw no relationship between any of Vasquez's prior cases and the McConnell murder. He asserted that his representation of Belmontes was not inhibited by his prior representation of Vasquez and that his loyalty to Belmontes was complete and undivided. Schick stated that he considered calling Vasquez as a witness and would have been prepared to cross-examine him fully had he taken the stand. However, he also admitted that he did not investigate Vasquez's violent criminal history even though doing so would have been helpful to Belmontes' defense. Schick stated that he did not make

---

6. Schick avers that he was not aware of this case at the time he represented Belmontes.

a tactical decision not to pursue this investigation. He explained that his normal procedure is to investigate the criminal record of a potential witness; however, he did not consider Vasquez a potential witness until after he had entered a guilty plea.

Schick testified at his deposition that he knew that he had a continuing duty of loyalty to Vasquez, but he did not view Belmontes' defense as conflicting with that duty in any way. However, Schick admitted that he knew that the district attorney could revive the 1979 murder charge against Vasquez at any time (although he also stated that it never crossed his mind that the prosecution would do so as a result of any evidence Schick presented at Belmontes' trial). In addition, Schick recognized that even though Vasquez entered his guilty plea prior to Belmontes' trial, Vasquez had an ongoing liberty interest in being viewed as an aider and abettor in the McConnell murder, and not the actual killer.

2. Discussion

At the outset, we dispose of the state's procedural objections to the claim. The state first contends that the claim is unexhausted because Belmontes did not present to the California Supreme Court all of the facts underlying the claim. This argument fails because "new factual allegations do not render a claim unexhausted unless they 'fundamentally alter the legal claim already considered by the state courts.' " Chacon v. Wood, 36 F.3d 1459, 1468 (9th Cir.1994) (quoting Vasquez v. Hillery, 474 U.S. 254, 260 (1986)). Here, although the additional facts add some evidentiary support to the claim, they do not "fundamentally alter" it. See Weaver v. Thompson, 197 F.3d 359, 364 (9th Cir.1999) (holding that jury misconduct claim was properly exhausted when petitioner presented incidents of improper jury contact that differed in number, but not in kind, from what was presented to state courts). The essential factual and legal theories are the same as those presented to the California courts. Therefore, Belmontes adequately exhausted

the claim.

Next, the state argues that the claim is barred by the Teague nonretroactivity doctrine. See Teague v. Lane, 490 U.S. 1031 (1989). The government bases this argument on the Supreme Court's recent statement that, as far as its own precedent is concerned, the question whether Cuyler extends to cases of successive representation is still open. Mickens v. Taylor, 535 U.S. 162, _____, 122 S.Ct. 1237, 1246 (2002). However, we have held that circuit court holdings suffice to create a "clearly established" rule of law under Teague. Bell v. Hill, 190 F.3d 1089, 1091 (9th Cir.1999). In this circuit, it was well-established at the time that Belmontes' conviction became final that conflicts of constitutional magnitude can arise from cases of successive representation. See, e.g., Mannhalt v. Reed, 847 F.2d 576, 579 (1988); United States v. Wheat, 813 F.2d 1399, 1402 & n. 1 (9th Cir.1987), aff'd on other grounds, 486 U.S. 153 (1988). Accordingly, the conflict claim is not Teague-barred.

We also hold that Belmontes' purported waiver of the conflict of interest was invalid. "For a waiver to be knowing and intelligent, the defendant must have been sufficiently informed of the consequences of his choice." Lockhart v. Terhune, 250 F.3d 1223, 1232 (9th Cir.2001) (internal quotation marks and citations omitted). Here, Schick failed to inform Belmontes or the court of the extent of his prior relationship with Vasquez. In addition, neither Schick nor the trial judge explained to Belmontes that Schick owed a continuing duty of loyalty to Vasquez, a duty that could potentially conflict with Belmontes' defense theory--that Vasquez was McConnell's actual killer. Under these circumstances, we conclude that Belmontes was not sufficiently informed of the consequences of his choice, and his waiver was therefore invalid. See Lockhart, 250 F.3d at 1232-33, citing United States v. Curcio, 680 F.2d 965, 976-77 (8th Cir.1982) (holding that waiver was ineffective when the defendant was informed of possible conflict due to attorney's prior representation of codefendant and told that conflict may arise

from prior confidential communications, but not told that conflict may arise from attorney's continued loyalty to codefendant).

To establish a Sixth Amendment violation based on conflict of interest, the defendant must show that an actual conflict of interest adversely affected his lawyer's performance. Cuyler, 446 U.S. at 338; Mannhalt, 847 F.2d at 579. Generally, it is more difficult to demonstrate an actual conflict resulting from successive, rather than simultaneous, representation. Mannhalt, 847 F.2d at 580. Conflicts of interest based on successive representation may arise if the current and former cases are substantially related, if the attorney reveals privileged communications of the former client, or if the attorney otherwise divides his loyalties. Id. Ultimately, however, an actual conflict of interest is one "that affected counsel's performance--as opposed to a mere theoretical division of loyalties." Mickens, 122 S.Ct. at 1243. In other words, the simple "possibility of conflict is insufficient to impugn a criminal conviction." Cuyler, 446 U.S. at 350.

We must decide whether the potential conflict of interest engendered by Schick's prior representation of Vasquez ripened into an actual conflict. We begin by noting that there is no suggestion that Vasquez's prior cases were substantially related to the McConnell murder or that Schick was in possession of privileged communications from Vasquez. Therefore, if Belmontes is to demonstrate an actual conflict, he must show that Schick "divide[d] his loyalties" between Vasquez and Belmontes. Fitzpatrick v. McCormick, 869 F.2d 1247, 1252 (9th Cir.1989), citing Mannhalt, 847 F.2d at 580. In engaging in this inquiry, we look beyond Schick's protestations to the contrary to see whether independent evidence in the record supports the allegation of divided loyalties. United States v. Shwayder, 312 F.3d 1109, 1119 (9th Cir.2002) ("Human self-percep-tion regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it.");

Sanders v. Ratelle, 21 F.3d 1446, 1452 (9th Cir.1994) ("The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict.").

After a careful examination of the record, we find no evidence that Schick divided his loyalties between Vasquez and Belmontes. Indeed, Belmontes' entire defense was that Vasquez was the killer. This case is thus distinguishable from cases like Lockhart, Sanders, and Fitzpatrick, all of which addressed situations in which defense counsel sabotaged their current clients' case by refusing to raise the obvious defense that a former client was actually responsible for the murder. See Lockhart, 250 F.3d at 1230-31 (where the evidence showed that the same person had committed both an earlier murder and the murder for which defendant was on trial, defendant's trial counsel refused to present evidence that his former client had committed the earlier murder); Sanders, 21 F.3d at 1453(defense counsel successively represented two brothers who were accused of the same murder; the first brother confessed his guilt to defense counsel, who advised him to take the Fifth at his brother's trial; at the trial, defense counsel put forth an unconvincing alibi defense rather than evidence that the first brother had committed the murder); Fitzpatrick, 869 F.2d at 1251-52(defense counsel refused to present defense that a former client actually committed the murder; because of the prior attorney-client relationship, defense counsel believed in the former client's innocence to the detriment of his current client).

Belmontes argues nevertheless that an actual conflict of interest affected Schick's performance at his trial. According to Belmontes, even though Schick argued that Vasquez was the killer, he failed to support this theory with hard evidence. Belmontes asserts that Schick should have investigated Vasquez's lengthy criminal record and presented it as evidence that Vasquez was the actual killer. He also asserts that Schick should have impeached Bolanos by showing that he was in fear

for his life due to death threats issued by Vasquez and thus had a powerful motive to falsely shift the blame from Vasquez to Belmontes. Belmontes argues that the only possible explanation for these lapses on Schick's part is that he felt bound by a continuing duty of loyalty to Vasquez, and that this duty required him to refrain from presenting evidence that could have resulted in the revival of the 1979 murder prosecution or impaired Vasquez's prospects for an early parole on his second degree murder conviction in the current case.

We are of the view, however, that these alleged failings are too speculative to sustain a conflict of interest claim. This is not a case in which Schick failed to present evidence that went directly to Vasquez's--and therefore Belmontes'--guilt or innocence. Rather, Schick sought squarely to place the blame on Vasquez, and did not overlook any direct evidence on that point. He simply failed to investigate and present evidence of Vasquez's prior bad acts, which, if admissible, might have marginally affected whether a jury would have had a reasonable doubt as to Belmontes' guilt. Given the absence of evidence suggesting that Vasquez was the actual killer and given the damaging nature of Belmontes' own conflicting statements, any counsel might have failed to investigate and offer evidence regarding Vasquez's criminal history. In short, we hold that this failure, standing alone, is not enough to show that Schick divided his loyalties between Vasquez and Belmontes. It is not "likely" that a conflict caused Schick to handle Belmontes' case as he did. See United States v. Miskinis, 966 F.2d 1263, 1268 (9th Cir.1992). Thus, Belmontes has not shown that he was deprived of his Sixth Amendment rights by an actual conflict of interest.

C. Involuntary Statement

Belmontes argues that the prosecutor violated his due process rights by introducing into evidence his involuntary, inculpatory statements. However, Belmontes testified in his deposition that he spoke to the police freely and voluntarily. There was no due process violation here.

D. Counsel's Failure to Challenge Arrest Warrant

Belmontes claims that his trial counsel was constitutionally ineffective for failing to challenge his arrest warrant. He argues that the warrant in his case was facially insufficient to support a finding of probable cause because nothing in the warrant corroborated the allegation that Belmontes himself, as opposed to Bolanos, was involved in the crime.[7]

---

7. The warrant reads:

Detective Elbert Holman, San Joaquin County Sheriff's Office, will testify that: he responded to 17281 N. Sunrise St. Victor, CA on 3/15/81 in the early afternoon. The house was ransacked.

Deputy St. Sure will testify he was the first deputy Sheriff to arrive at 17281 N. Sunrise. Steacy Mc Connell was on the floor being administered to by medical personnel. Steacy McConnell subsequently died.

Dr. Madieros did the autopsy on Steacy McConnel. The cause of death was blunt trauma to the head.

Bob Bolanos, after being advised of his Miranda rights, waived those rights and told Detective the following: That he went to the home of Domingo Vasquez, Jr. He was with Fernando Delmontes on 3/15/81. While at the Vasquez house, Vasquez called Stacy Mc Connell. Thereafter, the three of them talked about the fact that Steacy possessed some expensive property at her residence. Fernando Delmontes said he needed money to send to his wife in Los Angeles. Delmontes decided to burglarize the McConnell residence after Vasquez told them McConnell would not be home. Vasquez and Bolanos agreed to go with Delmontes. Bolanos drive them to McConnell's in his car. Upon arriving in the vicinity, Delmontes got out, carrying an iron bar he had brought with him from Vasquez's house.

Delmontes told Bolanos to wait in the car for 30 minutes, then to drive to McConnell's and get him.

1. Strickland Claim

In order to prevail on his ineffectiveness claim, Belmontes must show that: (1) his trial counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable
probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 686 (1984). To satisfy Strickland's prejudice prong in a Fourth Amendment context, Belmontes must demonstrate a reasonable probability that a motion to suppress would have succeeded and that the suppression of the warrant would have led to a different outcome at the trial. Kimmelman v. Morrison, 477 U.S. 365, 375 (1986). The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error. See id. at 384.

At the time of Belmontes' trial, the federal Aguilar- Spinelli test applied to affidavits supporting warrant applications. Aguilar-Spinelli did not require independent corroboration of the facts set forth in the affidavit. Rather, under Aguilar-Spinelli, the affidavit on its face had to provide enough information so that a magistrate could determine: (1) that the informant was reliable (the "veracity" prong); and (2) that his information was dependable (the "basis of knowledge" prong). Spinelli v. United States, 393 U.S. 410 (1969); Aguilar v. Texas, 378 U.S. 108, 114 (1964); United States v. Larkin, 510 F.2d 13, 15 (9th Cir.1974). Under federal law, the affidavit met both prongs. Because the

---

When they drove to McConnell's, they opened the trunk, and Vasquez went into the house. Vasquez carried stereo speakers from the house to the car trunk. Delmontes followed Vasquez out with the receiver portion of the stereo. Delmontes was splattered with blood. Vasquez was not. Delmontes said McConnel was in the house, and when Bolanos drove up, he beat her with the iron bar. The stereo was later sold, and the proceeds divided.

affidavit stated that Bolanos acquired his information through first-hand observation, it satisfied the "basis of knowledge" prong, Aguilar, 378 U.S. at 114, and because it contained a statement against penal interest, it satisfied the veracity prong. United States v. Harris, 403 U.S. 573, 583-84 (1971) (holding that, in most cases, statements against penal interest are inherently reliable); but see United States v. Hall, 113 F.3d 157, 159 (9th Cir.1997) (declining to apply Harris to accomplice informant because "once a person believes that the police have sufficient evidence to convict him, his statement that another person is more important to his criminal enterprise than he gains little credibility from its inculpatory aspect").

Nor would the claim have had a reasonable probability of success under California law. According to the California Supreme Court, the affidavit contained sufficient corroboration to support a finding of probable cause:

> The circumstances of the crime and evidence found at the crime scene--as summarized in the affidavit--corroborated Bolanos' statement.... [T]rial counsel could reasonably have concluded that the affidavit contained sufficient corroboration of Bolanos's hearsay statement; that the arrest warrant thus issued on probable cause; and that a de novo motion to quash the warrant would have proved futile.

People v. Belmontes, 45 Cal.3d 744, 768 (1988). We are bound by statements of the California Supreme Court as to California law. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions."). Accordingly, we must conclude that Schick would not have had a reasonable probability of success in challenging the arrest warrant. Thus his failure to challenge the warrant does not constitute ineffective assistance of counsel.

2. Franks Claim

Belmontes also alleges that material omissions in the affidavit caused the magistrate to issue a warrant for which there was no probable cause. See Franks v. Delaware, 438 U.S. 154, 156 (1978). Under Franks, if a criminal defendant establishes by a preponderance of the evidence that an officer recklessly omitted material information from the affidavit, and if the affidavit considered with the omitted evidence is insufficient to establish probable cause, then the "warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking." Id.

On appeal, Belmontes did not specify what evidence was omitted from the warrant, but he did refer to the California Supreme Court opinion, which described four categories of evidence: (1) The affiant, a police officer, was familiar with Vasquez's violent history but did not know Belmontes; (2) Bolanos's car had been identified at the scene of the crime; (3) Bolanos offered his statement only after his car was impounded and his girlfriend had incriminated him; and (4) at first, Bolanos lied when speaking to the police. Belmontes, 45 Cal.3d. at 769. Three of these omitted facts cast aspersions on Bolanos' credibility because they highlight his strong motive to shift the blame for McConnell's death to someone else. The fourth is plainly of no relevance. As to the three, the face of the affidavit makes clear that Bolanos was Mirandized, which itself indicates that Bolanos was a suspect in the crime. The omitted details add more color to Belmontes' claims, but they do not change the basic calculus involved in determining Bolanos' reliability. Accordingly, they are not material, and the Franks claim must be denied.

E. Doyle Claim

Belmontes asserts that the prosecutor violated his due process rights by cross-examining him as to his post-arrest silence in violation of Doyle v. Ohio, 426 U.S. 610 (1976). However, the Supreme Court has held that Doyle does not apply to a defendant who has waived his Miranda rights and voluntarily given a statement to the police. Anderson v. Charles, 447 U.S. 404, 408

(1980). Belmontes testified in his deposition that he understood his Miranda rights, waived them, and spoke freely and voluntarily to the police. No Doyle error occurred.

F. Unconstitutional Restriction on Cross-Examination

Belmontes contends that the trial judge violated his Sixth Amendment rights by unconstitutionally restricting his cross-examination of Karrie Lynn Vasquez, Vasquez's wife. Ms. Vasquez testified that she saw Belmontes take the iron bar from the kitchen and heard him admit to killing McConnell. Defense counsel sought to impeach her testimony by demonstrating that she was lying in order to increase Vasquez's chances at an early parole by emphasizing Belmontes' greater culpability. This strategy was foiled because the trial judge refused to allow defense counsel to question Ms. Vasquez as to her knowledge of the length of Vasquez's sentence.

The Confrontation Clause protects a defendant's right to cross-examine witnesses as to potential bias. Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986). However, the trial judge retains considerable latitude to impose reasonable limits on cross-examination based on harassment, prejudice, confusion of the issues, and relevance. Id. Any error is subject to harmless error review. Id. at 684.

Despite the fact that the trial judge prevented defense counsel from exploring Ms. Vasquez's bias with respect to the length of Vasquez's sentence, defense counsel cross-examined her extensively and effectively. Defense counsel elicited testimony that Ms. Vasquez had known her husband for eight years, bore his child, stayed with him in spite of his frequent infidelity, married him while he was in prison for the McConnell murder, and visited him in jail every weekend. The jury thus had ample reason to believe that Ms. Vasquez was biased in favor of her husband. In addition, counsel forced Ms. Vasquez to admit that, although she had been questioned extensively during the police

investigation, it was not until the day before Belmontes' trial that she first claimed to have heard him admit to the crime. This testimony strongly suggested that Ms. Vasquez was lying about what she claimed to have heard. Ms. Vasquez could not have been impeached much more effectively.

In light of the extensive and effective cross-examination that occurred, and the minimal amount of additional force the excluded material would have added, the error, if any, could not have had a substantial and injurious effect on the jury's verdict. Brecht v. Abrahamson, 507 U.S. 619, 637-38 (1993). Accordingly, we deny relief on this claim as well.

G. Evidentiary Errors

Belmontes argues that his trial was rendered fundamentally unfair by the introduction of hearsay and double-hearsay statements supporting Bolanos' testimony that Belmontes was the actual killer. However, the California Supreme Court held that these statements were properly admitted prior consistent statements. We are bound by the opinion of the California Supreme Court in these matters of state law. Estelle, 502 U.S. at 67-68. As the Court has stated, "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." Marshall v. Lonberger, 459 U.S. 422, 438 n. 6 (1983). Here, the statements added little and did not render the trial fundamentally unfair.

H. Instructional Error

Belmontes also challenges an instruction directing the jury not to speculate as to why other individuals involved in the crime were not on trial along with Belmontes. He claims that this instruction prevented the jury from considering the impact of Bolanos' immunity agreement on his credibility. We must determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 72 (internal quotation marks omitted). We conclude that

it did not, because the jury was also instructed that it should view Bolanos' testimony with suspicion due to his involvement in the crime. Accordingly, we deny this claim also.

I. Fair Cross-Section

Belmontes alleges that he was deprived of a jury comprised of a fair cross-section of the community because of the systematic exclusion of minority jurors from the venire. However, he provides no statistical data in support of his claim. Belmontes' claim is thus barred by our decision in Thomas v. Borg, 159 F.3d 1147 (9th Cir.1998). In that case, the petitioner argued that we should excuse his failure to provide the necessary statistical evidence because his trial counsel was constitutionally ineffective for failing to preserve it. Id. at 1150. We held:

> [F]or purposes of our fair cross-section analysis, the reason for Thomas' lack of evidence is immaterial. Because Thomas has provided us with insufficient statistical evidence to determine whether blacks were substantially underrepresented on jury venires or panels in Kern County at the time of his trial, his Sixth Amendment fair cross-section claim must be denied.

Id. at 1150-51. Applying Thomas to the facts of this case, we must deny the claim.

J. Jury Misconduct

Belmontes contends that the district court erred in denying him an evidentiary hearing on his juror misconduct claims. A habeas petitioner must meet two conditions to be entitled to a federal evidentiary hearing: He must (1) allege facts which, if proven, would entitle him to relief, and (2) show that he did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding. Id. at 1126-27. A petitioner who meets these conditions must receive a hearing. See, e.g., Williams v. Taylor, 529 U.S. 420 (2000) (holding that because

prisoner diligently pursued claim in state court, and was denied a hearing, he was entitled to a hearing in federal court); United States v. Navarro-Garcia, 926 F.2d 818, 822 (9th Cir.1991) ("Unless the court is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing must be held.").

Belmontes first asserts that the jurors based their decision on the view that "life without possibility of parole did not mean that Belmontes would spend the rest of his life in prison." Belmontes is not entitled to relief on this claim because it concerns intrinsic jury processes. "[I]ntrinsic jury processes will not be examined on appeal and cannot support reversal." United States v. Bagnariol, 665 F.2d 877, 887 (9th Cir.1981).

Belmontes next alleges that the jurors had improper contacts with members of the victim's family. He bases this contention on an excerpt from the record in which the trial court reprimanded one of the jurors for talking to the victim's father about motorcycles. After the reprimand, the trial court conducted a hearing and determined that the juror was not biased as a result of his contact with the victim's father. Belmontes does not assert either that the hearing was not full or that it was not fair. Nor does he assert that he has any newly discovered evidence. Accordingly, he is not entitled to a federal evidentiary hearing on this claim.[8/]

Third, Belmontes asserts that several jurors prejudged his guilt and engaged in premature deliberations. However, even assuming that the jurors did the latter, Belmontes would not

---

8. Moreover, the state court's factual determination is subject to a presumption of correctness. Patton v. Yount, 467 U.S. 1025, 1037 n. 12 (1984); 29 U.S.C. § 2254(d) (1994). To overcome the presumption, Belmontes must establish by clear and convincing evidence that the state court's factual finding was erroneous. Patton, 467 U.S. at 1037 n. 12. However, he submitted no evidence tending to overcome the presumption, and the record contains none.

necessarily be entitled to relief. See, e.g., United States v. Klee, 494 F.2d 394, 396 (9th Cir.1974) (denying motion for new trial even though jurors discussed the case during breaks and expressed premature opinions about the defendant's guilt). A petitioner must allege facts which, if proved, would show that the premature deliberations prejudiced him to the extent that he did not receive a fair trial. United States v. Hendrix, 549 F.2d 1225, 1229 (9th Cir.1977). Belmontes has not done so here; indeed, he has not alleged any facts other than that premature deliberations took place.

As to the alleged juror prejudgment, in his Amended Petition for Writ of Habeas Corpus, Belmontes contends that "[a] sitting juror remarked, 'Here comes the killer,' whenever petitioner was brought into court." While this claim, if true, might possibly entitle him to relief, see Dyer v. Calderon, 151 F.3d 970, 973 (9th Cir.1998) (en banc) ("The bias or prejudice of even a single juror would violate [a criminal defendant's] right to a fair trial."), Belmontes did not include the issue in his request for an evidentiary hearing or present any facts that would entitle him to relief. Accordingly, the district court did not err in failing to afford him a hearing on that claim.

Because Belmontes has not alleged facts that, if true, would entitle him to relief, we affirm the district court's denial of an evidentiary hearing on his jury misconduct claims.

IV. SPECIAL CIRCUMSTANCES ISSUES

A. Racial Discrimination in Charging

Belmontes alleges that the charging decision in his case violated the Eighth Amendment and the Equal Protection Clause because it was infected by racial discrimination against defendants whose victims were white. In support of his claim, Belmontes relies on an expert report prepared by Richard Berk, a well-respected professor of sociology and statistics at the University of California, Los Angeles. Berk analyzed prosecutors' charging

decisions in 122 death-eligible homicides committed in San Joaquin County from August 1977 through 1986.[9] In order to describe accurately the role of race and ethnicity in death penalty charging, he coded data for over 450 variables. After running numerous logistic regression tests, Berk concluded that the odds of being charged with special circumstances varied significantly according to the race of the victim. A defendant who killed a white person was five times more likely to be charged with special circumstances than a defendant who killed an African American and twenty times more likely to be charged than if the victim were Latino. Predictably, however, the government's experts reviewed Berk's report and the underlying data and opined that the data did not reveal a pattern of discriminatory charging in San Joaquin County. For the purposes of this opinion, we assume the accuracy and statistical validity of the Berk report.[10]

Belmontes' claim of discriminatory charging is essentially a selective prosecution claim, and we analyze it under that rubric. Selective prosecution doctrine, however, poses significant hurdles for Belmontes. The government retains broad discretion as to whom to prosecute. Wayte v. United States, 470 U.S. 598, 607 (1985). Because the decision to prosecute is based on such factors as the strength of the case, the government's enforcement

---

9. The data set consisted of probation department reports for all death-eligible homicides charged during the relevant time period, except 70 cases for which the County lacked complete reports, 52 cases in which the defendants were not bound over for trial on murder charges, and six cases in which the defendants were female.

10. The district court questioned the relevance of the Berk report on the ground that Berk based his conclusions on "a model that used only four non-racial factors." Although the tables printed in the report contained only four non-racial variables, the report stated that Berk and his team actually considered many other variables in addition to those set forth in the tables. In his declaration, Berk characterized the small, six-variable model as "simply a summary" and stated that he considered all the variables in the data set, which included many non-racial factors. We have no reason to disbelieve Berk's sworn statement and can only conclude that the district court was mistaken.

priorities, and the case's relationship to those priorities, the Supreme Court has stated that such decisions are "particularly ill-suited to judicial review." Id. at 607. Therefore, a presumption of regularity supports prosecutorial judgments, and "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." United States v. Armstrong, 517 U.S. 456, 463, 464 (1996) (quoting United States v. Chem. Found., Inc., 272 U.S. 1, 14-15 (1926)). "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978).

Yet, there is a line the prosecution may not cross. Although prosecutorial discretion is broad, it is not unlimited. United States v. Batchelder, 442 U.S. 114, 125 (1979). Rather, "a prosecutor's discretion is 'subject to constitutional constraints.' " Armstrong, 517 U.S. at 464 (quoting Batchelder, 442 U.S. at 125). The decision to prosecute may not be based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights. Armstrong, 517 U.S. at 464; Wayte, 470 U.S. at 608. Likewise, the decision to charge the death penalty cannot rest on criteria that offend the Constitution. McCleskey v. Kemp, 481 U.S. 279, 293 (1987); Adamson v. Ricketts, 865 F.2d 1011, 1022-23 (9th Cir.1988) (en banc), abrogated on other grounds, Walton v. Arizona, 497 U.S. 639 (1990), overruled, Ring v. Arizona, 536 U.S. 584 (2002).

In order to prevail on a selective prosecution claim, a defendant must show that the prosecutorial policy both had a discriminatory effect and was motivated by a discriminatory purpose. Armstrong, 517 U.S. at 465; see also McCleskey, 481 U.S. at 292 ("[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in his case acted with discriminatory purpose."). To establish a discriminatory effect in a race discrimination case, a defendant must prove that

similarly situated individuals of a different race, or whose victims were of a different race, were not prosecuted. Armstrong, 517 U.S. at 467.[11]

We reject the government's contention that the Supreme Court rejected similar statistical evidence in McCleskey v. Kemp, and that Belmontes' statistics are therefore "insufficient as a matter of law." The factual showing made by McCleskey was materially different from the showing made in this case. In McCleskey, the Supreme Court reviewed the claim of a Georgia prisoner who alleged that the Georgia capital sentencing statute violated the Equal Protection Clause because it was administered in a racially discriminatory manner. 481 U.S. at 286. In support of his claim, McCleskey offered a sophisticated statistical study that demonstrated that Georgia defendants whose victims were white were 4.3 times as likely to receive a death sentence as those whose victims were black. Id. The Court denied his claim, holding that McCleskey's statewide statistics did not meet his burden of proving that the imposition of the death penalty in his

---

11. In Armstrong, the Supreme Court stated that "[t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals of a different race were not prosecuted. 517 U.S. at 465" (emphasis added). Belmontes' statistics do not meet this showing. Nevertheless, although Belmontes' claim is based on the race of his victim, not his own race, we do not read this sentence as barring our review. In McCleskey, the court examined a statistical study that showed statistical disparities according to the race of the victim. 481 U.S. at 286-87. In that case, the State argued that McCleskey did not have standing to raise a discrimination claim based on his victim's race. Id. at 291 n. 8. The Court concluded that McCleskey did have standing to raise this claim, id., and it addressed directly McCleskey's argument that he was "discriminated against ... because of the race of his victim." Id. at 292. Armstrong did not discuss the issue of the victim's race at all, nor did the majority opinion even mention McCleskey. That question was simply not before the Court. In short, we are confident that Armstrong did not intend to overrule the pertinent portion of McCleskey. Accordingly, we conclude that a defendant may bring a selective prosecution claim based solely on the race of his victim, and that to establish a discriminatory effect in a race-of-the-victim case, he must show that similarly situated individuals whose victims were of a different race were not prosecuted.

particular case was the product of purposeful discrimination. *Id.* at 293 similarly refused to allow petitioners in California and Arizona to submit statistics that demonstrated racial disparities in the imposition of the death penalty statewide as evidence of discrimination in an individual case. See Carriger v. Lewis, 971 F.2d 329, 334 (9th Cir.1992) (en banc) (Arizona); Harris v. Pulley, 885 F.2d 1354, 1374-75 (9th Cir.1989) (California). Unlike McCleskey, Carriger, and Harris, however, Belmontes offered statistics that provided information limited to the charging entity--the San Joaquin County District Attorney's Office--and its death penalty charging practices over time. Thus he provided what the statistics in McCleskey lacked: information specific to the decisionmaker in his case. We conclude that statistics relating to the charging entity, such as those presented by Belmontes, are materially more probative of discrimination in capital charging than those considered by the Supreme Court in McCleskey. See United States v. Bass, 536 U.S. 862 (2002) (approving of "a showing regarding the record of the decisionmakers in respondent's case"). Thus, Belmontes' proffered statistics are not barred by McCleskey and may support a prima facie showing of unlawful charging discrimination

.

We next confront the question whether Belmontes' proffered statistical evidence proves a "discriminatory effect" under Armstrong. The statistics show that defendants whose victims were white were charged with special circumstances 30% of the time, whereas similarly situated defendants whose victims were African American or Latino were charged with special circumstances only 19% and 6% of the time, respectively. Because Belmontes' statistics revealed that individuals whose victims were white were far more likely to be charged with a capital offense than similarly situated individuals whose victims were non-white, we conclude that Belmontes established the requisite discriminatory effect. See id. (approving of statistical evidence that assesses whether similarly situated individuals were treated differently).

Under Armstrong, however, a discriminatory effect is not enough; Belmontes must also show that the decisionmakers in his case acted with a discriminatory purpose. Armstrong, 517 U.S. at 465. Here, Belmontes must show that the San Joaquin County District Attorneys Office pursued a death sentence in his case "at least in part because of" the race of his victim. Wayte, 470 U.S. at 610 (internal quotation marks omitted). Because Belmontes offered no non-statistical evidence on this point, we must decide whether his statistical evidence constitutes a prima facie showing of an intent to discriminate on the part of San Joaquin County District Attorney's Office.

The Supreme Court has not determined whether statistics relating exclusively to the prosecuting authority are sufficient, standing alone, to establish a prima facie claim of discriminatory intent in a capital charging case. On the one hand, the Court "has accepted statistics as proof of intent to discriminate in certain limited contexts," McCleskey, 481 U.S. at 293, and has held that appropriate statistics may be enough to establish a prima facie case in a number of circumstances, including challenges to the composition of the jury venire, id., Title VII employment discrimination, id. at 294, legislative redistricting, Hunt v. Cromartie, 526 U.S. 541, 548-49 (1999) and contemporaneous challenges to a prosecutor's acts. See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986). In addition, the Court has recently reaffirmed Yick Wo v. Hopkins, 118 U.S. 356 (1886), in which the petitioner, a Chinese laundry owner, relied entirely on statistics to prove that the City of San Francisco engaged in purposeful discrimination. See, e.g., Armstrong, 517 U.S. at 464-65; McCleskey, 481 U.S. at 293 & n. 12. On the other hand, the Court has held that statistical evidence, standing alone, is not enough to make out a prima facie case of discrimi-nation with respect to a jury's verdict. See McCleskey, 481 U.S. at 294-96 & 295 n. 14. Although language in McCleskey suggests the "impropriety" of requiring a prosecutor to explain his charging decision years after it was made, id. at 296 & n. 17, the Court acknowledged that, generally, when a petitioner makes out a

prima facie case of discrimination, a prosecutor must provide an explanation. Id. & n. 18.[12]

While we think that Belmontes' statistics provide a strong showing of intentional discrimination, we need not decide whether, in a discriminatory charging case, statistics standing alone can make out a prima facie case. Assuming arguendo that they can and that Belmontes has made out a prima facie case, here the State has provided evidence that is sufficient to overcome that showing. In his deposition, the prosecutor stated that when he decided to pursue a death sentence against Belmontes, he had reason to believe that prior to the McConnell murder Belmontes had shot and killed Jerry Howard. In short, the prosecutor asserted that he pursued a death penalty against Belmontes, not because of McConnell's death alone, but because he believed that Belmontes had actually committed more than one murder. Moreover, the evidence in the record is sufficient to provide a good faith basis for such belief. Thus, there appears to be a legitimate, race-neutral reason for a prosecutor to seek a death sentence in this particular case, and therefore sufficient evidence to rebut the inference of discrimination raised by Belmontes' statistical study. More important, Belmontes does not challenge the state's assertion that the prosecutor's explanation is sufficient to rebut his prima facie case. In his brief, he does not contend that the fact that a defendant is a double murderer is not a valid reason for seeking the death penalty; nor does he argue that the statistics show that racial disparity exists with respect to cases in which the defendant has killed, or is believed to have killed, more than one victim. Accordingly, we conclude that, even if Belmontes' statistics were sufficient to raise a prima facie

---

12. We note that a decision to charge a capital rather than a non-capital offense is far more significant and important than a decision to challenge a particular juror. A charging decision is made with great deliberation over a period of time and is generally the product of a deliberative process involving more than one person. Moreover, unlike the case of a juror challenge, there is a full record of the relevant events that ordinarily contains all of the objective factors upon which the decision-making would have been based.

case of purposeful discrimination, the State has successfully rebutted it by offering the prosecutor's legitimate, race-neutral explanation for his actions. We therefore deny the racial discrimination in charging claim.

B. Arbitrariness and Capriciousness in Charging

Belmontes also argues, independent of his discrimination claim, that the charging of special circumstances in his case was so arbitrary and capricious that it violated the Eighth Amendment. According to Belmontes, his crime was one of the least aggravated of death-eligible crimes, yet he was one of only a very few defendants to actually receive the death penalty. In contrast, many defendants who committed far more heinous crimes than he obtained lesser punishments. According to Belmontes, this disparity shows that in San Joaquin County at the time of his trial there was "no meaningful basis for distinguishing the few cases in which [a death sentence] is imposed from the many cases in which it is not." Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). Belmontes argues that because the death penalty regime under which he was charged, convicted, and sentenced is indistinguishable from that struck down in Furman, his sentence must be vacated as unconstitutionally arbitrary and capricious.

Belmontes' claim, however, although styled as one of arbitrary death penalty charging, is actually a claim of arbitrary imposition of the death penalty. He does not argue that the prosecutor's decision to charge him with special circumstances was arbitrary and capricious. Rather, he contends that it was arbitrary and capricious to impose the death penalty on him because other defendants who had committed more heinous crimes than he did not receive the death penalty. The Supreme Court considered and rejected this claim in McCleskey. 481 U.S. at 306-12. As we are bound by controlling precedent, we must do the same.

V. PENALTY PHASE ISSUES

A. Instructional Error

Belmontes contends that the trial judge's instructions to the jury prevented it from considering nonstatutory mitigating circumstances relating to the likelihood that he would live a constructive life in prison and make positive contributions to others if granted life without the possibility of parole. Because we conclude that there is a reasonable probability that as a result of instructional error the jury did not consider constitutionally relevant mitigating evidence, and because we believe that the error was not harmless, we grant the petition with respect to the sentencing phase.

1. Factual Background

At Belmontes' trial, the judge gave the jury the then-standard model jury instructions, modified to eliminate four factors that the prosecution and defense agreed had no relevance to the case. The jury was therefore instructed:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of any criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the defendant acted under extreme duress or the substantial domination of another person.

(f) The age of the defendant at the time of the crime.

(g) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.[13]

The judge also gave the jury half of a supplemental instruction requested by the defense. The part that was given read:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate

punishment in this case.

The other half of the instruction, which the trial judge refused to give, stated: "[Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence."

After several hours of deliberations, the jury sent the judge a note

---

13. To remain consistent with the text of the statute and the Supreme Court's terminology in Boyde, we will refer to this factor as "factor (k)," or "unadorned factor (k)."

asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought back to the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can." The jurors asked again what would happen if they could not agree, but the court refused to tell them.

The judge asked the jury: "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" The jurors agreed that they needed more time to deliberate. They then asked the following series of questions:

JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?

THE COURT: That was the listing, yes, ma'am.

JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?

THE COURT: That is right. It is a balancing process. Mr. Meyer?

JUROR MEYER: A specific question, would this be an either/or situation, not a one, if you cannot the other [sic]?

THE COURT: No. It is not that.

JUROR MEYER: It is an either/or situation?

THE COURT: Exactly. If you can make that either/or decision. If you cannot, I will discharge you.

JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?

THE COURT: That is something you cannot consider in making your decision.

2. Discussion

The California death penalty statute has a unique mechanism for guiding the jury's discretion. Instead of separate sets of aggravating and mitigating circumstances, the statute features an eleven-factor test which focuses the jury's attention on the specifics of the crime and the background and character of the defendant. Tuilaepa v. California, 512 U.S. 967 (1994); Cal.Penal Code § 190.3. The first ten factors instruct the jury to evaluate various circumstances of the crime and the defendant's age and prior convictions. See Cal.Penal Code § 190.3. The jury itself decides whether these factors are aggravating or mitigating. People v. Benson, 52 Cal.3d 754, 802 (1990). The eleventh factor--factor (k)--is intended to function as a catch- all that will enable the jury to consider any relevant mitigating circumstance that the defendant proffers as a basis for a sentence less than death. The jury is obligated to weigh and balance the aggravating and mitigating circumstances and must impose the death penalty if it determines that the circumstances in aggravation outweigh those in mitigation. See Cal.Penal Code § 190.3.

In this statutory scheme, the importance of factor (k) cannot be overstated. The Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate. Penry v. Johnson, 532 U.S. 782, 797 (2001); see also Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982) ("The sentencer ... may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration."); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that the Eighth Amendment requires that the sentencer consider "as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence

less than death") (emphasis in original). This broad mandate includes the duty to consider mitigating evidence that relates to a defendant's probable future behavior, especially the likelihood that he would not pose a future danger if spared but incarcerated. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986). Factor (k) provides the only mechanism for allowing the jury to consider a substantial portion of many defendants' mitigating evidence-indeed, all mitigating evidence that does not relate to the circumstances of the crime or the defendant's age and criminal record.

To pass constitutional muster, the trial judge's instructions must convey to the jury that factor (k) compels it to consider all relevant mitigating evidence proffered by the defendant as a basis for a sentence less than death. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." Penry v. Lynaugh, 492 U.S. 302, 319 (1989). Rather, the trial judge's instructions must convey "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Buchanan v. Angelone, 522 U.S. 269, 276 (1998), citing Penry, 492 U.S. at 317-18; Eddings, 455 U.S. at 113-14; Lockett, 438 U.S. at 604.

At the time of Belmontes' trial, factor (k) allowed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The Supreme Court had occasion to review this language in Boyde v. California, 494 U.S. 370 (1990). In Boyde, the defendant had argued that the jury instruction was unconstitutional because there was a reasonable likelihood that the jury would construe the instruction as forbidding it from considering evidence unrelated to the crime--e.g., mitigating evidence relating to the defendant's background and character. However, the Supreme Court held that because of the view "long held by society" that a defendant with a disadvantaged

background or emotional or mental problems may be "less culpable than defendants who have no such excuse," the jury was reasonably likely to have understood that the defendant's evidence of "his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles" could have "extenuate[d] the gravity of the crime even though it [wa]s not a legal excuse for the crime." Id. at 381- 82 & n. 5. The Court held that, because the trial judge instructed the jury that it "shall consider all of the evidence which has been received during any part of the trial of this case," there was no reasonable likelihood that the jury believed that factor (k) prevented it from considering the background and character evidence introduced by Boyde and its bearing on Boyde's commission of the crime. Id. at 383 (emphasis in original).[14/] In other words, the Supreme Court held that the unadorned factor (k), at least when accompanied by an appropriate clarifying instruction, was constitutional as applied to mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense.

The same type of evidence, however, can serve an alternative forward-looking purpose, mitigating in a manner wholly unrelated to a petitioner's culpability for the crime he committed. This alternative purpose has nothing to do with persuading the jury that the defendant is less culpable with respect to the crime because of some aspect of his family background, personal history, character, or mental capacity. Rather, as defined by the Supreme Court in Skipper v. South Carolina, the jury must "consider[ ] a defendant's past conduct as indicative of his probable future behavior " and "draw[ ] favorable inferences" about a defendant's "probable future conduct if sentenced to life

---

14. The Court also defined "extenuates" to mean "lessens the seriousness of a crime as by giving an excuse." Id. at 381.

in prison." 476 U.S. at 4-5, 106 S.Ct. 1669(emphasis added).[15] The Court characterized this kind of mitigation as "an inevitable and not undesirable element of criminal sentencing" and stated that, even though these kinds of inferences "would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be mitigating in the sense that they might serve as a basis for a sentence less than death." Id. at 4-5 (emphasis added) (citations and internal quotation marks omitted). Accordingly, the Court held that "[u]nder Eddings, such evidence may not be excluded from the sentencer's consideration." Id. at 5. The Court's opinion in Boyde did not address whether a reasonable jury would have interpreted the unadorned factor (k) instruction to include the use of this same type of evidence for a forward-looking purpose which serves to mitigate without ameliorating the crime. Boyde, 494

---

15. In attempting to extend Boyde to issues of future conduct, the dissent errs by focusing on the temporal nature of the evidence rather than the purpose for which it is introduced. In the instant case, the operative distinction is not between categories of "pre-crime" and "post- crime" evidence in the sense of when the acts that constitute the evidence occurred, but rather between a jury's use of background and character evidence to mitigate culpability for the crime, as opposed to the use of the same type of evidence to draw favorable inferences about petitioner's probable future conduct. This latter use of the evidence can, as Skipper holds, serve as a wholly separate and independent basis for a sentence less than death.

The dissent also attempts to distinguish Payton v. Woodford, 299 F.3d 815, 828-30 (9th Cir.2002) (en banc), vacated on other grounds, 123 S.Ct. 1785, on remand at 346 F.3d 1204, 2003 WL 22383147 (9th Cir. Oct.20, 2003)(en banc), on similarly erroneous grounds. Post. at 909-10. In Payton, the mitigating evidence fell outside the meaning of factor (k) because its "post-crime" character meant that it served to mitigate without ameliorating the crime itself. Payton, 346 F.3d 1204, 2003 WL 22383147, at *6. Similarly, this alternative use of "pre-crime" evidence can mitigate without ameliorating the crime itself. Thus, the central question is not whether the jury "was able to consider and give effect to all of Belmontes' mitigating evidence," post. at 909 (emphasis added), but rather what mitigating effect the jury understood to be permissible under the instruction as stated. Skipper requires that the jury understand that evidence must be given mitigating effect whether it bears on petitioner's culpability for the crime or instead relates to petitioner's future potential for constructive conduct.

U.S. at 382 n. 5 (distinguishing Boyde from Skipper on the ground that Boyde's mitigation evidence "was introduced not to demonstrate that he was a 'model prisoner' like Skipper and therefore unlikely to present a risk of future dangerousness but ... as part of petitioner's overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties.").

Belmontes contends that his Eighth and Fourteenth Amendment rights were violated because the trial judge's instructions failed to advise the jury to consider the portion of his mitigating evidence that tended to show that he would adapt well to prison and would become a constructive member of society if granted a life sentence. We review this claim of instructional error under the approach set forth by the Supreme Court in Boyde, which directs us to determine whether there is a reasonable likelihood that the jury understood the instruction in a manner that resulted in its failure to consider constitutionally relevant evidence. 494 U.S. at 380. Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hern,[16] the Court has held that we must examine claims of instructional error in light of the record as a whole. Id. at 377. Accordingly, in assessing Belmontes' claim of instructional error, we consider the entire mid-deliberation colloquy as well as the original jury

---

16. We reject the government's argument that the mid-deliberation exchange does not count as a jury instruction because it was "rather informal" and occurred after the formal charge. See Shafer v. South Carolina, 532 U.S. 36 (2001) (labeling the trial judge's answer to the jury's mid-deliberation question an "instruction" and criticizing it because it "did nothing to ensure that the jury was not misled"); Bollenbach v. United States, 326 U.S. 607 (1946) (reversing and remanding because a "supplemental instruction" from the trial court following a question by the jury was "simply wrong"); McDowell v. Calderon, 130 F.3d 833, 836 (9th Cir.1997) (en banc), overruled in part on other grounds, Weeks v. Angelone, 528 U.S. 225 (2000) (explaining that the trial judge's duty to instruct the jury adequately "continues until a verdict is reached and returned. As they work towards a verdict, the jurors must stay in the channel charted for them by state law. To this end, they may need ongoing guidance.").

instructions.

We begin with the original instructions. As stated above, Belmontes' jury was instructed to consider and take into account

"[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal.Penal Code § 190.3.[17] Most naturally read, this instruction allows the jury to consider evidence that bears upon the commission of the crime by the defendant and excuses or mitigates his culpability for the offense. We now know that such evidence includes background and character, both of which tend to explain why the defendant committed the crime. By its plain language, however, the instruction does not encompass events or considerations that are unrelated to the defendant's culpability. In particular, the instruction does not apply to those forward-looking considerations encompassed by the Supreme Court's decision in Skipper: evidence that allows the jury to evaluate the defendant's probable future conduct if incarcerated for life without the possibility of parole-- specifically, evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment. These important sentencing considerations are simply not in any respect "circumstance[s] that extenuate[ ] the gravity of the crime." See Skipper, 476 U.S. at 4 (stating that lack of future dangerousness does "not relate specifically to petitioner's culpability for the crime he committed"); see also Boyde, 494 U.S. at 382 n. 5.[18] Moreover, unlike in Boyde,

---

17. The California legislature has since reformulated the instruction to direct the jury to consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." CALJIC 8.85(k) (6th ed.1996). See also People v. Easley, 34 Cal.3d 858 (1983) (recognizing that unadorned factor (k) had significant potential for jury confusion.).

18. On remand from the Supreme Court, our en banc court recently

"society" has not had a "long held view" that a defendant's likely future conduct can serve to mitigate or excuse his commission of a serious crime. Rather, the doctrine is a legal concept peculiar to capital punishment cases. Thus, in the absence of a clear instructions on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor.

In the current case, the most important part of Belmontes' mitigation presentation was that the jury should spare his life because he had the potential, if confined within a prison setting, to contribute positively to prison life. Although the record made before the jury included a substantial amount of evidence about his difficult childhood, in his own testimony he repeatedly stated that he did not want to use his rough childhood "as a crutch" or an excuse. Thus, ultimately the more significant evidence related to his conduct during the period of his prior CYA incarceration and to his ability to conform his behavior to societal norms should he be confined within a structured prison environment. Belmontes' counsel argued to the jury that the evidence demonstrated that if granted life without parole, he would adapt well to prison life, would make a positive contribution to the welfare of others, and would not pose a future danger to the guards or the other inmates.

Unlike the background and character evidence in Boyde that tended to mitigate the offense, Belmontes' mitigation evidence was simply not covered by any natural reading of the words of

---

considered the identical unadorned factor (k) instruction, applying the AEDPA standard of review, a more deferential standard than the one we apply here, and reached the same conclusion on the merits that we do. See generally Payton v. Woodford, 346 F.3d 1204, 2003 WL 22383147 (9th Cir. Oct.20, 2003) (en banc). Although we could adopt the en banc court's reasoning here, we reach that same result on the basis of our own independent analysis.

the unadorned factor (k) instruction. To the contrary, that instruction, read most naturally, suggested to the reasonable juror that Belmontes' evidence tending to show his probable future good conduct should be excluded from consideration, and thus that such evidence was governed by the earlier instruction that the jury "consider all of the evidence ... except as you may be hereafter instructed." At the least, the unadorned factor (k) instruction is ambiguous with respect to Skipper's requirement that the jury be permitted to consider and give effect to evidence bearing on a defendant's probable future good conduct when it decides whether to impose the death penalty, see 476 U.S. at 5, and thus with respect to the jury's right to consider Belmontes' most important mitigating evidence.

The court's supplemental instructions only exacerbated this problem. Belmontes' counsel had requested instructions that would have expressly instructed the jury that it "should not limit [its] consideration of mitigating circumstances to these specific factors," i.e., the factors listed in the
original instruction. However, although the trial judge gave part of the instruction requested by defense counsel, he refused to give the most critical portion. Instead, the trial judge gave a set of contradictory instructions that failed to inform the jury that it could consider the portion of Belmontes' mitigating evidence bearing on his probable future conduct. The trial judge started out on the right track by instructing the jury that it should view the statutory factors "merely as examples of some of the factors" that it could consider. However, any clarity gained at the outset of the instruction was immediately undone by a superceding qualifying directive. The judge added, "You should pay careful attention to each of these factors," an instruction that a reasonable juror would almost certainly have understood to refer to the statutory factors, and particularly to the unconstitutionally limiting unadorned factor (k). The trial judge then continued, "Any one of them [i.e., the factors] standing alone may support a decision that death is not the appropriate punishment in this

case," implying that only a statutory factor can support a sentence less than death. A juror who followed these instructions would likely think that he could not consider nonstatutory mitigating evidence--evidence not going to culpability--such as testimony tending to show that Belmontes would lead a constructive life if confined permanently within a structured environment. Still, the supplementary instructions did not end the matter.

Compounding the problems with the original and supplemental instructions were the trial judge's responses to the jurors' questions during the mid- deliberation colloquy. In that colloquy, the trial judge again directed the jury's attention to the literal text of the original unadorned factor (k) instruction, which strongly implied that the jury could not consider evidence regarding the defendant's probable future conduct. The jury had deliberated for several hours before it sent the judge a note indicating that it was deadlocked. The note read, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" In the discussion that followed, the judge properly ascertained that further deliberations would probably be fruitful. He then suggested to the jury that it might be helpful to "go over the instructions again with one another" as they continued to deliberate. It was at this point that the jurors began to question the judge with respect to the aggravating and mitigating factors. Juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that was the listing?" When the court responded affirmatively, she asked, "Of those certain factors we were to decide one or the other and then balance the sheet?"

Juror Hern's questions reveal that she did not understand that her duty as a juror was to consider all of Belmontes' mitigating evidence. The most reasonable way to interpret her first question is as an effort to clarify that the jury should look to the statutory factors (a) through (g) [or unadorned (k)], as read to the jury by the trial judge, to determine what counted as aggravating and mitigating circumstances. It appears that by asking, "that was the

listing?," Juror Hern wanted confirmation that there was a finite list of factors for the jury to consider and that the list consisted of the statutory factors read to the jury by the judge. This interpretation is reinforced by Juror Hern's next question: "Of those certain factors, we were to decide one or the other [e.g., whether the evidence is aggravating or mitigating] and then balance the sheet?" The structure of this question separates the "certain factors" that appear in "the listing" from other factors that may not be reflected there. It makes it clear that at least one juror believed that the jury should consider, weigh, and balance only "those certain factors" that appeared in "the listing." Of course, such a belief would have been incorrect; the jury was required to consider and evaluate Belmontes' mitigating evidence relating to his potential adjustment to life in prison regardless of the fact that it was not listed in the statute.

In any event, Juror Hern's questions signified that she was not sure how to follow the judge's instructions.[19] "When a jury

---

19. The Supreme Court has frequently accepted jury questions as evidence that the trial judge's original instructions were not sufficiently clear. See, e.g., Shafer, 121 S.Ct. at 1273 ("Shafer's jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means."); Simmons v. South Carolina, 512 U.S. 154, 178 (1994) ("[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison."); Bollenbach, 326 U.S. at 612 ("The jury's questions ... clearly indicated that the jurors were confused."). We have done so as well. E.g., Morris v. Woodford, 273 F.3d 826, 840 (9th Cir.2001) (citing fact that jury asked mid-deliberation question as evidence that it was confused by the original instruction); United States v. Frega, 179 F.3d 793 (9th Cir.1999) (stating that a reviewing court may infer from the jury's questions that it was confused about a controlling legal principle). Here, as in those cases, Juror Hern's questions strengthen our conviction that the original and supplemental instructions did not convey to the jury that it could consider Belmontes' nonstatutory mitigating evidence pertaining to his probable future behavior in prison if incarcerated for life.

makes explicit its difficulties a trial judge should clear them away with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612-13 (1946). In this case, the trial judge had a duty to cure any ambiguity in his instructions by providing a clear description of the jury's obligations. The judge should have answered Juror Hern's questions by instructing the jury that "the listing" of mitigating factors was not exhaustive and that the jury's duty was to consider and weigh all of the mitigating evidence presented by Belmontes during the sentencing phase. Cf. Boyde, 494 U.S. at 383. Instead, however, the judge simply affirmed Juror Hern's incorrect assumptions with a terse, "That is right." In so doing, he not only failed to correct Juror Hern's erroneous view, but he likely left all the jurors with the impression that they could consider mitigation evidence only if it appeared as one of the "certain factors" in "the listing." As we have discussed, Belmontes' principal mitigating evidence does not fall in this category.

The trial judge also instructed the jury that it could not consider a specific subject relating to Belmontes' ability to adjust to prison life. Less than thirty seconds after Juror Hern's inquiry, Juror Hailstone said: "Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The trial judge responded: "That is something you cannot consider in making your decision." He did not explain why the jury could not consider this issue, and immediately after issuing this response, he sent the jury off to resume its deliberations. The instruction not to consider possible

---

We need not rely on affirmative evidence of jury confusion in order to reach this conclusion, however. See Kelly v. South Carolina, 534 U.S. 246, 122 S.Ct. 726, 733 (2002) ("Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion."). "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any indication of perplexity on their part." Id. To hold otherwise would condition our ability to redress serious constitutional violations on such subjective vagaries of fate as whether the jurors happened to ask a question instead of embarking boldly down the wrong path.

future psychiatric treatment was misleading because of the judge's failure to explain to the jury why it could not consider the prohibited subject; to the extent that the jury believed that it could not consider mitigating evidence relating to how Belmontes might behave in a controlled prison environment, the instruction as given would likely have confirmed its misconception.

Juror Hailstone's question and the trial judge's response are troubling because of the likelihood that the jury understood them

in the context of the larger discussion about how to consider, weigh, and balance aggravating and mitigating circumstances.[20] In such case, the jury would have inferred from the trial judge's response that it could not consider Juror Hailstone's question, not because there had been no evidence presented on the subject at trial, but because it raised a consideration that did not relate to one of the "certain factors" set forth in "the listing," or, to put it differently, to one of the factors bearing on the defendant's culpability for the crime. The trial judge's response thus likely reinforced the jury's mistaken notion that Belmontes' mitigation evidence relating to his probable future good conduct if confined in a structured prison environment was irrelevant to the

---

20. The government insists that the reason for his answer was obvious: There was no evidence presented on the topic of possible psychiatric treatment at Belmontes' trial; therefore, the jury could not consider it. The government argues that the jurors would have realized that this was why they could not consider Juror Hailstone's question, and so the trial judge's response could have had no effect on their deliberations. We reject this contention. The jurors at Belmontes' trial were not lawyers; they were not schooled in the rules of evidence, and they had no reason to know that the trial judge's response was based on an evidentiary concern (if, in fact, it was based on an evidentiary concern rather than on the trial judge's misunderstanding of the law). It is far more likely that the jury would have viewed this question and its answer in the manner that we have described.

sentencing decision.

The next question is whether the trial judge's various instructions relating to limitations on the evidence that could be considered had an effect on the jury's deliberations. We may not reverse the jury's penalty determination unless the instructions actually created "a reasonable probability that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380 (emphasis added). The jury's decision must stand "if there is only a possibility of such an inhibition." Id. (emphasis added).

We hold that there is a reasonable probability that, as a result of the court's instructions, the jury in Belmontes' case did not consider his principal mitigating evidence. The trial judge began by giving a faulty instruction, one that on its face arguably does not allow consideration of mitigating evidence pertaining to the defendant's probable future good behavior in prison, as opposed to his culpability for the crime. He then rejected a significant part of the supplemental instruction that Belmontes proposed in an effort to solve the problem. The jurors were understandably confused, and they asked questions of the court in an effort to clarify the scope of their duty. In the course of that dialogue, the trial judge endorsed Juror Hern's view of the instructions, a view that strongly suggested that the jury could consider, weigh, and balance only "those certain factors" that appeared in "the listing." Following that endorsement, the trial judge advised the jury without further explanation that, in making its decision, it could not consider the possibility that Belmontes could receive psychiatric treatment in prison. In sum, every instruction that the jury received tended to convey the message that the jury could not consider Belmontes' mitigating evidence unless it related to his culpability for the crime. Under these circumstances, there is, at the least, a reasonable probability that the jury did not consider Belmontes' principal mitigation evidence--the evidence that provided the factual support for his argument in mitigation: that he would live a productive life if permanently incarcerated in a structured environment. Because "[t]he Eighth Amendment

requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner," Boyde, 494 U.S. at 377- 78, the unadorned factor (k) instruction, as applied in Belmontes' case, was unconstitutional.

Having concluded that an error of constitutional magnitude infected the penalty phase of Belmontes' trial, we turn finally to the question whether that error was nonetheless harmless. See Boyde, 494 U.S. at 380 (applying Brecht harmless error standard). Belmontes cannot obtain a new trial unless the instructional error had "a substantial and injurious effect" on the jury's verdict. Brecht v. Abrahamson, 507 U.S. at 637. We hold that it did.

Our cases are divided as to whether the petitioner, the state, or neither bears the responsibility for showing harmless error under the Brecht harmless error standard. Compare Rodriguez v. Marshall, 125 F.3d 739, 744 (9th Cir.1997) (placing burden on petitioner), with Keating v. Hood, 191 F.3d 1053, 1062 (9th Cir.1999) (as amended) (placing burden on state), and Thompson v. Borg, 74 F.3d 1571, 1575 (9th Cir.1996) (rejecting burdens of proof in favor of an independent determination of whether a trial error had a substantial and injurious effect). In a recent case, we attempted to clarify the rule, holding that "[t]he Supreme Court has made clear that whether a trial error had a substantial and injurious effect is not to be analyzed in terms of burdens of proof." Mancuso v. Olivarez, 282 F.3d 728, 737 n. 4 (9th Cir.), as amended, 292 F.3d 939 (2002), citing O'Neal v. McAninch, 513 U.S. 432, 436 (1995). In Mancuso, we explained that the reviewing court has "the responsibility to determine this legal question 'without benefit of such aids as presumptions or allocated burdens of proof that expedite factfinding at the trial.' " Id. (quoting O'Neal, 513 U.S. at 437). Nevertheless, we stated that "[I]f one is left in grave doubt [about the harmfulness of the error], the conviction cannot stand." Id. (quoting Kotteakos v. United States, 328 U.S. 750, 765 (1946)). Because the court was convinced that the constitutional error in that case was neither

substantial nor injurious, and because it did not find itself in "grave doubt," it upheld the conviction. Id. at 953, 958.

A subsequent decision of the en banc court affirmed Mancuso's reasoning but went on to address what the court should do when it finds itself in "grave doubt" about the harmlessness of the error.[21] See Payton, 346 F.3d 1204, 2003 WL 22383147, at *9. We held:

> If ... we are not fairly assured that there was no effect on the verdict, we must reverse. [O'Neal, 513 U.S. at 437 (quoting Kotteakos v. United States, 328 U.S. 750, 764-65 (1946))]. In the "narrow circumstances" in which we are in "grave doubt" as to the effect of the constitutional error, we must assume that there was such an effect, and grant the petition. O'Neal, 513 U.S. at 436, 438; see also Thompson, 74 F.3d at 1575.
>
> In the course of this inquiry, it is the State that bears the "risk of doubt." O'Neal, 513 at 438; Valerio v. Crawford, 306 F.3d 742, 746 (9th Cir.2002)(en banc), cert. denied, 123 S.Ct. 1788 (2003). We look to the State to instill in us a "fair assurance" that there was no effect on the verdict. See Morales v. Woodford, 336 F.3d 1136, 1148 (9th Cir.2003) ("[T]he state must provide us with a 'fair assurance' that the error was harmless under Brecht."); Valerio, 306 F.3d at 762; see also O'Neal, 513 U.S. at 443 ("[T]he State normally bears responsibility for the error that infected the initial trial."). Only if the State has persuaded us that there was no substantial or injurious effect on the verdict do we find the error harmless.

---

21. Payton characterized the appropriate inquiry as: "Do I, the judge, think that the error substantially influenced the jury's decision?" Id. at *10 (quoting O'Neal, 513 U.S. at 436). It stated that the court should answer this question without reference to presumptions and burdens of proof. Id.

Id. at *10; see also id. (examining Supreme Court precedent and concluding that "[t]his framework is faithful to the balance the Supreme Court has struck between concerns of federal-state comity and finality in state criminal trials, and the irreversible harm caused by an execution resulting from an unconstitutional error"). Because we found ourselves in "grave doubt" about the effect of the instructional error in that case, we held that the error was not harmless, and we granted the writ with respect to the penalty phase. Id. at *9-10.

Here we need not consider whether the state, the defendant, or neither party bears the burden of proof, or whether to follow the approach set forth in the vacated en banc opinion. We do not find ourselves in "grave doubt." The issue of burdens is irrelevant to this case. No matter who has the burden, or if there is no burden at all, we are convinced that the instructional error in this case, which prevented the jury from considering and giving effect to Belmontes' most important mitigation evidence, had a substantial and injurious effect on the jury's verdict. At the penalty phase of this trial the aggravating evidence was not strong. It basically consisted of the fact that Belmontes was previously incarcerated in the youth facility for being an accessory after the fact to voluntary manslaughter, one domestic violence incident, and two occurrences relating to possession, or possible possession, of a gun. The prosecutor candidly told the jury that there was not a lot in the way of aggravating evidence. He asked the jury to return a death sentence because of the circumstances of the crime itself. Yet the crime, though shocking and deplorable, was in essence a robbery gone wrong. The murder was not pre-planned, nor did it involve kidnapping, rape, torture, multiple victims, or any of the other especially heinous elements that usually are present when a jury votes for the ultimate penalty. In short, the McConnell murder was of the kind that generally does not result in a death penalty.[22/]

---

22. On this point, Belmontes submitted evidence that, of the thirty

Under these circumstances, there is a reasonable probability that a properly instructed jury would have spared Belmontes' life had it believed that he would not pose a future danger if sentenced to life without parole, and that instead he would become a model prisoner who could contribute something of value to society. The

state concedes that Belmontes presented "substantial" evidence in support of this mitigation theme. Several witnesses, including Belmontes himself, testified that although he had difficulty in acting appropriately in the outside world, he thrived in the structured, institutional environment of prison. Belmontes described his experience on the CYA's fire crew, during which he rose from last man to number two, a position of leadership and responsibility, and about his gradually increasing involvement in Christianity during his prior incarceration. Reverend Barrett spoke about Belmontes' participation in the M 2 Christian sponsorship program, which he felt was genuine, and testified that in his opinion if granted a life sentence Belmontes would make positive contributions to prison life through his involvement with the prison ministries. One of Belmontes' most important witnesses was Reverend Miller, who testified that Belmontes had been good at counseling young inmates not to repeat the mistakes that he had made and that he "definitely would be used in the prison system for this kind of activity" if granted life without parole.

The importance of this mitigation theme was stressed during closing arguments. In his allocution, Belmontes took responsibility for his actions and stated that he did not want to use his difficult childhood as an excuse. He asked the jury to give him the opportunity to rehabilitate himself, set goals, and make a positive contribution to the welfare of others while in

---

defendants who were tried for felony-murder in San Joaquin County between 1977 and 1986, only two, including Belmontes himself, received a death sentence. Many defendants whose crimes by any measure were substantially more aggravated than Belmontes' did not receive a death penalty.

prison. His counsel repeated this theme in his emotional closing argument, in which he asked the jury to spare Belmontes' life on the ground that he would make positive contributions if allowed to live out his natural life in prison.

Given the weakness of the aggravating evidence and the substantial nature of the mitigating evidence, we conclude that had the jury been properly instructed, and had it understood that it could consider and give effect to the evidence regarding Belmontes' ability to function effectively in a prison setting, there is a reasonable probability that it would have returned a different verdict. Accordingly, Belmontes is entitled to relief on the sentencing phase.

CONCLUSION

Although we are disturbed by the prosecution's failure to disclose impeaching evidence and to correct false testimony on the part of its principal witness, as well as by defense counsel's failure to disclose the extent of his prior representation of Vasquez and to pursue a full investigation of Vasquez's background, and although we are at least as disturbed by the results of the study that showed the discriminatory racial effect of the County's capital charging policies, we cannot conclude, for the reasons we have explained, that any of these occurrences served to violate Belmontes' constitutional rights. Thus, we are compelled to deny relief with respect to the guilt phase, including the special circumstances finding. However, because the trial judge failed to instruct the jury that it was required to consider Belmontes' principal mitigation evidence, and because we conclude that this failure had a substantial and injurious effect upon the verdict, we reverse with respect to the sentencing phase. We remand to the district court with instructions to issue an appropriate writ vacating Belmontes' death sentence.

AFFIRMED in part, REVERSED in part, and REMANDED for issuance of the writ in accordance with this opinion.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part:

The court properly affirms Judge Levi's determination that there was no constitutional error in Belmontes's convictions for first degree murder with special circumstances in state court. I am pleased to concur in its conclusions as to the guilt phase. Regrettably, as to the penalty phase, the majority strains mightily--and unpersuasively--to perceive constitutional error in the compre-hensive and perfectly proper jury instructions given by the state trial judge. Because there simply is no such error, and the Supreme Court has expressly told us so, I must respectfully dissent from the court's reversal of the district court's denial of the petition for the writ with respect to the penalty phase.

Just over a decade ago, the Supreme Court in Boyde v. California, 494 U.S. 370 (1990), interpreted the same jury instruction at issue today, "factor (k)," and concluded that it was constitutionally sound. The Court held that there was no "reasonable likelihood that the jury ... applied [factor (k)] in a way that prevent[ed] the consideration of constitutionally relevant evidence." Id. at 380. Nonetheless, the majority manages to distinguish Boyde, and makes the extraordinary conclusion that there was a reasonable likelihood that the jury refused to consider mitigating evidence that both the prosecution and the defense acknowledged was properly before it. Because the jurors were not constitutionally barred from making a death penalty determination in this case, I would affirm.

I

At the close of the penalty phase, the state trial court judge began

instructing the jury on aggravating and mitigating circumstances as follows: "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." The court then read an enumerated list of seven factors, exhaustive with respect to aggravating circumstances, but only examples with respect to mitigating circumstances. The last of these factors, factor (k), instructs the jury to consider, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The majority, by misconstruing both Supreme Court precedent and the evidence in this case, concludes that the factor (k) instruction failed to provide an outlet for the jury to consider some of Belmontes's penalty phase evidence.

A

The majority's holding is based on the false premise that factor (k) limits the jury's consideration only to circumstances that might excuse the crime. See supra, at 897. But the Court has already explicitly rejected this proposition. In Boyde, the Court held that factor (k) did not "limit the jury's consideration to 'any other circumstances of the crime which extenuates the gravity of the crime.' [It directed the jury] to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character." 494 U.S. at 382 (emphases in original); see also id. at 381 (holding that there was "no[ ] ... reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character."). Boyde makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k).

Belmontes's penalty phase presentation was entirely composed of such evidence. The witnesses who testified on his behalf spoke to his religious convictions and his behavior while a ward

of the California Youth Authority ("CYA")--all of which goes to his background and character before he murdered Steacy. While the majority attempts to paint such evidence as showing that he would be a model inmate if sentenced to life in prison, the testimony as actually presented deals exclusively with his character prior to the crime. In fact, not one witness who testified during the penalty phase testified to Belmontes's behavior after the murder.

By deftly labeling such testimony as "post-crime" mitigation evidence, the majority attempts to fit within the scope of Payton v. Woodford, 299 F.3d 815, 824-25 (9th Cir.2002) (en banc), vacated on other grounds by 123 S.Ct. 1785 (2003), on remand at 346 F.3d 1204, 2003 WL 22383147 (9th Cir. Oct.20, 2003) (en banc). Such attempt cannot work because Payton involved actual post-crime evidence--Payton's conversion to Christianity following his crime. Here, all of the evidence related to Belmontes's character before he committed his crime. Belmontes's religious conversion and ability to conform to prison are exactly the types of evidence which the Supreme Court held fit within the plain language of factor (k). See Boyde, 494 U.S. at 382 (holding that Boyde's strength of character in the face of adversity was considered evidence which "excused" the gravity of the crime under factor (k)). Accordingly, under Boyde, the jury was able to consider and to give effect to all of Belmontes's mitigating evidence. Nothing more was constitutionally required. Johnson v. Texas, 509 U.S. 350, 372-73 (1993) (holding that "a jury [need not] be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant.").

Even so, the Supreme Court has held that inquiry into future dangerousness of a defendant "is not independent of an assessment of personal culpability." Id. at 369. In Johnson, the Court held that an instruction which asked jurors to consider the future dangerousness of a defendant provided ample opportunity for the jury to consider the defendant's youth as mitigating evidence. Id. at 369-70. Even though the statutory factor did not

explicitly provide that the jury could consider the defendant's youth as a mitigating factor for culpability of the crime, the Court concluded that there was no reasonable likelihood that the jury would have thought it was foreclosed from considering it. Id. at 370.

Likewise, because factor (k) allows the jury to consider Belmontes's character and background, there is no reason to think that the jury would have thought it was foreclosed from using such information to consider his future potential if sentenced to life in prison. As the Supreme Court has noted, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing." Skipper, 476 U.S. at 5 (emphasis added); see Boyde, 494 U.S. at 382 ("Petitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death."); cf. Johnson, 509 U.S. at 370.

Thus, while the majority scours the cold record decades after the trial to find an ambiguity in the sentencing instruction, it is highly doubtful that the jury itself would have so found. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." Boyde, 494 U.S. at 380-81. I see no reason why the jury would have resisted the inevitable consideration of Belmontes's future potential in light of the character evidence presented.

B

The majority also ignores the Supreme Court's advice that "[d]ifferences in interpretation may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at the trial likely to prevail over technical hairsplitting." Boyde, 494 U.S. at

380-81. That factor (k) permits the consideration of Belmontes's character evidence is amplified when the penalty phase is viewed as a whole, particularly in light of the arguments made by counsel.

Like the instruction given in Boyde, the jury in this case was told that it must consider all the evidence unless otherwise instructed. Boyde, 494 U.S. at 383 (relying in part on the fact that Boyde's jury was instructed that it "shall consider all of the evidence which has been received during any part of the case" (emphasis in original)). Although it is undisputed here that neither the court

nor the parties told the jury that it could not consider any of the evidence presented by Belmontes, the majority infers ambiguity.

In this case, the jury heard, without objection, evidence regarding Belmontes's behavior in prison before the murder: how he had found God and how he could serve as an example to other inmates. In its closing argument, the prosecution stated, "I suspect you will be told ... that the defendant's religious experience is within that catchall [factor (k)] that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime. I'm not really sure it fits in there. I'm not sure it really fits in any of them." Even so, the prosecutor noted, "But I think it [Belmontes's religious experience] appears to be a proper subject of consideration."

Later the prosecutor expounded on why the jury should consider Belmontes's evidence:

> I suppose you can say it would be appropriate [to consider such evidence] because--in this fashion: The defendant may be of value to the community later. You recall the people talking about how he would have the opportunity to work with other prisoners in prison. And I think that value to the community is something that you have to weigh in. There's something to that.

Belmontes's pleas were similar. Belmontes asked for life in prison because in prison "there is an opportunity to achieve goals and try to better yourself." His counsel continued the argument, asking the jury to spare Belmontes's life because he would make a positive contribution if his life were spared: "[W]hat I am suggesting to you and what I hope the evidence suggests to you is Fernando Belmontes cannot make it on the outside. I think it is pretty clear from the development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own." He added,

> The people who came in here told you about him. They told you not only what they know of him, but they gave you, as best they could, under the very difficult circumstances of somebody looking at the rest of their life in prison, a game plan, something he can do with his life, something he's been able to do. We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, to contribute something in whatever way he can.

At no time did the prosecutor object to the defense's characterization, nor did the trial judge indicate that the parties' statements of law were not correct or that the jury could not consider any of the evidence. Nevertheless, the majority concludes that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes's lawyer were not smart enough to realize they were all mistaken. In its world, the majority envisions a jury playing a game of "gotcha" with the lawyers, whereby the jury ignores everyone and applies its own instructions.

Such a conclusion is pure fantasy and cannot justify overturning the jury's choice here. Compare Buchanan v. Angelone, 522 U.S. 269, 278-79 (1998) ("The parties in effect agreed that there was substantial mitigating evidence and that the jury had to weigh that evidence against petitioner's conduct in making a

discretionary decision on the appropriate penalty. In this context, 'there is not a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner.' "), with Payton v. Woodford, 346 F.3d 1204, 2003 WL 22383147, at *9 (holding that prosecutor's argument that factor (k) did not allow the jury to consider evidence of a post-crime religious conversion and trial court's failure to correct the argument with proper jury instructions meant that "there was a reasonable likelihood that ... the jury did not consider and give effect to post-crime mitigating evidence").

II

Even assuming, arguendo, that there was a reasonable likelihood that the jury could have interpreted factor (k) to prohibit consideration of Belmontes's character witnesses, the instructions were still constitutionally sufficient. To arrive at its result, the majority downplays the trial court's initial instruction, in which the jury was told, "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." (emphasis added). Such a jury instruction alone is constitutionally sufficient to convey to the jury its duty to consider all mitigating evidence. See Buchanan, 522 U.S. at 276 (holding that there was no likelihood of confusion when the jury had to indicate on the statutory verdict form that it had "considered the evidence in mitigation of the offense," and the trial court provided the following mitigation instruction: "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment"); Johnson, 509 U.S. at 368 (holding that jury instruction that stated the jury could consider all the mitigating evidence presented during both the guilt and penalty stage was sufficient to inform the jury that it could consider evidence of defendant's youth); Blystone v. Pennsylvania, 494 U.S. 299, 307-08 (1990) ("In petitioner's case the jury was specifically instructed to consider, as mitigating

evidence, any 'matter concerning the character or record of the defendant, or the circumstances of his offense.' This was sufficient to satisfy the dictates of the Eighth Amendment." (citation to the record omitted)); cf. Tuilaepa v. California, 512 U.S. 967, 979 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.").

The trial court's duty is simply to convey to the jury that all mitigating evidence must be considered and may be given effect when it deliberates on a defendant's capital sentence. Buchanan, 522 U.S. at 276. The absence of any specific instruction to the jury to consider the defendant's ability to adjust to an institutional setting is utterly irrelevant. Id. at 277 ("By directing the jury to base its decision on 'all the evidence,' the instruction afforded jurors an opportunity to consider mitigating evidence.").

Even if the jury were confused by the subsequent enumeration of individual factors--perhaps thinking that its consideration of mitigating evidence was limited to such factors--the confusion would have been short lived. After reading the enumerated factors, the court instructed, "[T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." The majority, however, fixates, not on the clear language of such directive, but on the two sentences which directly follow: "You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case." According to the majority, these sentences somehow obfuscate the clarity of the court's instructions.

We must look at these instructions in their entirety, however. The judge instructed,

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

When these instructions are read in context, there is little doubt that the court conveyed the message that the enumerated factors were not the exclusive mitigating circumstances that the jury could consider. The court first instructed the jury how to apply the aggravating circumstances, specifically that it could not consider any non-enumerated factors. The court then contrasted consideration of aggravating factors with mitigating factors, which it noted were merely "examples of some of the factors" that the jury could consider. The fact that the court further instructed that the jury should consider each of the mitigating factors (recall that "factors" refers to all mitigating circumstances and not, as the majority implies, to the enumerated circumstances read by the judge) as any one alone might support life in prison, was unlikely to confuse the jury, when viewed in totality.

The trial court's additional instruction reinforced the constitutional requirement of conveying to the jury that it is "not precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Buchanan, 522 U.S. at 276 (citations omitted). Instead of confusing the jury, the

trial court's instructions made it clear that all evidence that was presented must be considered. Moreover, the instruction which the majority concludes was "critical," supra, at 902, substantively adds nothing. Rather than speculating that the jury was too dim to understand what it was told by the court, we must presume that the jury understood the instructions taken as a whole. Weeks, 528 U.S. at 234.

III

According to the majority, however, it is the series of questions between individual jurors and the judge that proves the jury's confusion. After the jury deliberated for several hours, it sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The judge refused to tell the jury what would happen if they could not agree, but told them that it would discharge them if they could not reach an agreement. He then asked, "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?"

At this time, individual jurors asked the judge some questions.

> JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?
>
> THE COURT: That was the listing, yes, ma'am.
>
> JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> THE COURT: That is right. It is a balancing process.
>
> ...
>
> JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have

psychiatric treatment during this time?

THE COURT: That is something you cannot consider in making your decision.

In the majority's view, Juror Hern's use of the term "listing," and the judge's failure to note that the "listing" was not exclusive as to mitigating circumstances, shows that individual jurors were confused by the instruction. I respectfully disagree. The jury did not submit a formal question to the judge to indicate that it was confused as to its duties or the instructions, and no informal follow-up questions were asked by any jurors. And while the answers the judge gave the juror might have been cryptic, they were not incorrect. Cf. Bollenbach v. United States, 326 U.S. 607, 613 (1946).

Most importantly, just before the judge answered these informal questions, he asked the jury "to go over the instructions again." Under existing Supreme Court authority, any confusion with regard to its responsibilities would have been cleared up with another such review. See Weeks v. Angelone, 528 U.S. 225, 733-34 (2000) (holding that no likelihood of confusion existed when the trial judge referred back to his original instruction when the jury asked a question regarding the instructions themselves). And if, after reviewing the instructions once again, jurors were still confused about the evidence they could consider, they likely would have asked for a formal clarification. See id. at 734 (noting that jury did not submit follow-up question after judge referred it back to the original instructions). While it is possible that after reviewing the instructions again, confusion might have arisen, it was certainly not reasonably likely. See Boyde, 494 U.S. 370.

Incredulously, the majority also takes issue with Juror Hailstone's question regarding whether Belmontes could receive psychiatric treatment while in prison. The court properly instructed the jury that it could not consider such potentially mitigating evidence. And for good reason: no such evidence was

ever introduced at any stage of the trial. Indeed, the jury was prohibited from such considerations. See Hughes v. Borg, 898 F.2d 695, 700 (9th Cir.1990) ("State defendants have a federal constitutional right to an impartial jury and jurors have a correlative duty to consider only the evidence that is presented in open court."); see also TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) ("Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, a jury is bound to consider only the evidence presented to it in arriving at a judgment.").

There was absolutely nothing wrong with the trial judge's instruction that the jury could not consider evidence that was not presented; indeed, it would have been unconstitutional for him to have said otherwise. Yet, the majority ignores such niceties. If the jury were truly confused by the judge's answer, surely it would have asked a follow-up question of some sort. Nonetheless, without any basis in the record, the majority concludes that the judge's perfectly proper statement was likely to confuse.

IV

The majority concludes that the jurors listened to all the evidence regarding Belmontes's character, listened to the prosecution and the defense tell it to consider such evidence, and listened to the trial court tell it that it must consider all the evidence presented; yet the majority holds that the jury was confused about whether it could consider the evidence presented. Such conclusion, with all due respect, is simply beyond belief; such holding turns the entire proceeding "into a virtual charade." Boyde, 494 U.S. at 383 (citation and quote marks omitted).

The jury, in reality, returned a death sentence for Belmontes, not because of a confusing jury instruction, but because he murdered nineteen-year-old Steacy McConnell in cold blood, striking her

15-20 times in the head with an iron dumbbell he had brought with him to her house in case of such an encounter; I sincerely doubt the family and friends of Steacy would share the majority's callous view that her murder was not "especially heinous."

Not surprisingly, the prosecution was able to portray Belmontes as a violent young man by focusing on his past behavior: his armed theft of a loaded handgun, his tendency to carry such a weapon, his fight with another ward while in the CYA after pleading guilty to being an accessory after the fact to voluntary manslaughter, and his battery of his pregnant girlfriend, which caused her to drop their two-year-old daughter. It is such violent, anti- social behavior, not an ambiguous jury instruction, that placed him in the situation he now finds himself.

Perhaps the jury simply did not believe that a convicted murderer might be a particularly good role model to other inmates, despite Reverend Miller's testimony that Belmontes would be good at counseling other inmates not to repeat his "mistakes." After all, Steacy's murder was hardly a "mistake." Perhaps Belmontes's jailhouse conversion to Christianity, which mysteriously lapsed as soon as he returned to society, and his ascent to the top of CYA's fire crew, could rightly have been seen as manipulative ploys to gain early release for his previous crimes.

By concluding that the trial court's jury instructions were unconstitutional, the majority ignores the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." Boyde, 494 U.S. at 380. There is nothing in the record which would lead me to believe that there was a reasonable probability that the jury was confused about its sentencing duties; therefore I would affirm the denial of the petition for the writ as to the penalty phase. I must respectfully dissent from the majority's refusal to do so.[1/]

---

1. Belmontes also contends that he was deprived of constitutionally effective counsel during the penalty stage of his trial. His claim is without merit. See Strickland v. Washington, 466 U.S. 668, 694 (1984); Gerlaugh v.

Stewart, 129 F.3d 1027, 1035-36 (9th Cir.1997).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, pr, Petitioner-Appellant,	)	No. 01-99018.
	)	D.C. No.
v.	)	CV-89-00736-DFL
	)	Eastern District
JEANNE S. WOODFORD, Warden, for the California State Prison at San Quentin, Respondent-Appellee.	)	of California, Sacramento
	)	ORDER

Filed February 5, 2004

Before: Stephen Reinhardt, Diarmuid F. O'Scannlain, and Richard A. Paez, Circuit Judges

ORDER;
Dissent by Judge Callahan;
Dissent by Judge Bea

ORDER

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc. Judge O'Scannlain would grant the petition for panel rehearing and the petition for rehearing en banc.

The full court was advised of the petition for rehearing en banc. A judge requested a vote on whether to rehear the matter

en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc reconsideration. FED. R. APP. P. 35.

The petition for rehearing en banc is denied.

CALLAHAN, Circuit Judge, with whom Circuit Judges O'SCANNLAIN, TROTT, KLEINFELD, GOULD, TALLMAN, BYBEE and BEA join, dissenting from denial of rehearing en banc:

I respectfully dissent from the order denying rehearing en banc.

In 1982, a jury found Fernando Belmontes guilty of first-degree murder for beating a nineteen-year-old woman to death with a dumbbell bar and sentenced him to death.[1] On automatic appeal to the California Supreme Court, Belmontes argued, inter alia, that the trial court misinstructed the jury on the proper role of sympathy and general character and back-ground evidence during the trial's penalty phase. *See People v. Belmontes* ("*Belmontes I*"), 45 Cal.3d 744, 799, 248 Cal.Rptr. 126, 755 P.2d 310 (1988), cert. denied, 488 U.S. 1034, 109 S.Ct. 848, 102 L.Ed.2d 980 (1989). The supreme court, properly viewing the jury instructions and arguments as a whole, concluded that "no legitimate basis" existed for believing that the trial court had misled the jury. *Id.* at 802.

Now, twenty-one years after Belmontes' trial and fifteen years after the California Supreme Court's ruling, the panel's decision reverses Belmontes' sentence. In doing so, the panel majority concludes that the trial court had, in fact, misinstructed the jury regarding its sentencing responsibilities. *Belmontes II*, 350 F.3d at 908. This conclusion is in error for three reasons. First, the

---

1. Specifically, the jury convicted Belmontes of first-degree murder with special circumstances. It made special findings that Belmontes was the actual killer and that he had the specific intent that death occur. *Belmontes v. Woodford* ("*Belmontes II*"), 350 F.3d 861, 873 (9th Cir. 2003).

panel's conclusion defies the record and clear Supreme Court precedent. Second, as Judge O'Scannlain notes in his dissent, the panel's conclusion undermines the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Belmontes II*, 350 F.3d at 915(citing *Boyde v. California*, 494 U.S. 370, 380, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990)). Third, the panel reaches its conclusion despite the California Supreme Court's unanimous conclusion that "no legitimate basis" existed for believing that the trial court misled Belmontes' jury about its sentencing responsibilities. *Belmontes I*, 45 Cal.3d at 802.

I

Under the Eighth Amendment, a jury must consider all relevant mitigating evidence that a defendant presents to it and afford that evidence such weight as it deems appropriate. *Penry v. Johnson*, 532 U.S. 782, 797 (2001). Simply allowing a defendant to present mitigating evidence to the jury is not enough. *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). A jury must be able to consider, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Buchanan v. Angelone*, 522 U.S. 269, 276 (1998). Such mitigating considerations include looking at a defendant's past behavior and drawing favorable inferences about his probable future conduct. *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986).

Belmontes argues, and the panel agrees, that the trial judge erred in this regard by not advising the jury to consider the portion of his mitigating evidence that tended to show that he would adapt well to prison and would become a constructive member of society if granted a life sentence. In order for Belmontes to prevail on this argument, "a reasonable likelihood" must exist that the jury understood the court's instructions in a way that caused it not to consider this constitutionally relevant evidence. *Boyde*, 494 U.S. at 380. Contrary to the panel's decision, no such reasonable likelihood exists.

A

The trial judge began instructing the jury by stating that "it shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." The judge then read an enumerated list of seven mitigating circumstances. The last circumstance, the so-called "factor (k)," instructed the jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime."

The Supreme Court has interpreted factor (k) as specifically directing a jury "to consider any other circumstance that might excuse the crime, which certainly includes a defendant's background and character."[2/] *Boyde*, 494 U.S. at 3820; *see also Buchanan*, 522 U.S. at 277 (concluding that, by directing the jurors to base their decision on "all the evidence," that the instruction properly allowed the jurors to consider any mitigating evidence). The panel, however, concludes that these instructions,

---

2. Our recent decision in *Payton v. Woodford*, 346 F.3d 1204 (9th Cir. 2003) (en banc), does nothing to change this conclusion. Factor (k) was ambiguous under the specific facts of *Payton*. We reached that conclusion only by carefully distinguishing *Boyde*. *See Payton*, 346 F.3d at 1211-12.

We distinguished *Boyde* on two ground. First, *Payton* concerned "*post*-crime" mitigating evidence. *Boyde* (not to mention *Belmontes II*) concered "*pre*-crime" evidence. Second, the prosecutor in *Payton* "repeatedly stated to the jury that factor (k) did *not* encompass Payton's mitigating evidence of his religious conversion and good behavior in prison." *Id.* at 1212. The prosecutor in *Boyde* never suggested to the jury that it could not consider mitigating evidence of character and background. *See Boyde*, 494 U.S. at 385. Now in *Belmontes II*, the prosecutor *explicitly told the jury* that it should consider Belmontes' religious experience, his future value to the community and his ability to work with other prisoners when determining his sentence.

Thus, for the very reasons that *Boyde* did not control *Payton*, *Payton* does not now control *Belmontes*. Holding otherwise ignores our own *en banc* description of Supreme Court precedent. This misapplication highlights the danger and implications of the panel's decision.

by their plain language, do not encompass events or considerations unrelated to Belmontes' culpability, particularly forward-looking considerations such as Belmontes' future conduct if sentenced to life in prison. *Belmontes II*, 350 F.3d at 901. This conclusion is wrong.

As just noted, the Supreme Court has told us that factor (k) instructs the jury to consider a defendant's background and character. *Boyde*, 494 U.S. at 382. The Court has further noted that a jury's consideration of "a defendant's past conduct as indicative of his probable future behavior is an *inevitable* and not undesirable element of criminal sentencing." *Skipper*, 476 U.S. at 5 (emphasis added). If any doubt remained, the judge here further clarified the sentencing instructions and factor (k) by informing the jury that "the mitigating circumstances which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." *Belmontes II*, 350 F.3d at 897 (emphasis added).

The panel contends that the trial judge effectively undid any clarity that Belmontes' jury instructions had achieved by giving a "superceding qualifying directive." *Id.* at 902. Specifically, the panel points to the judge's following instructions: "You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case." According to the panel, a juror who followed these instructions would think that he or she could not consider nonstatutory mitigating evidence, namely, that the juror could not consider testimony tending to show that Belmontes would lead a constructive life in prison. *Id.* The panel thus suggests that the last two sentences of the jury instructions caused the jury to completely ignore the preceding sentences. This interpretation defies logic.

Nothing in the jury instructions was contradictory. The judge

enumerated seven mitigating *circumstances*. He told the jury that those enumerated *circumstances* were "examples of some of the factors " that the jury should consider. The judge told the jury that he had given them examples of factors-- examples to which the jury should pay careful attention and examples that, standing alone, could support a decision that death is not appropriate. Nowhere did the judge limit the jury to considering only the enumerated mitigating circumstances. Rather, he told them just the opposite.

We presume that a jury follows its instructions. *Weeks v. Angelone*, 528 U.S. 225, 234 (2000). We therefore must presume that the jury knew that the enumerated circumstances were "examples" of mitigating factors. The surrounding record further supports this presumption.

B

Even assuming, *arguendo*, that one might consider the court's jury instructions to be ambiguous, the jury did not reach its verdict in a vacuum. For this reason, we look to the mitigating evidence introduced into the record to discern what evidence the jury considered when faced with the allegedly ambiguous instructions. *Boyde*, 494 U.S. at 384 (stating that "the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous."). Here, the panel's own interpretation of the record suggests that the jury must have considered Belmontes' future potential as a life prisoner.

As the panel states, Belmontes put on "substantial" evidence that he could become a model prisoner and would not pose a future danger. *Belmontes II*, 350 F.3d at 907. Belmontes personally addressed the jury, asking the jurors to spare his life and to give him "an opportunity to achieve goals and try to better [him]self." *Id.* at 876 (alteration in original). In an "emotional closing argument," Belmontes' defense counsel "asked the jury to spare Belmontes' life on the ground that he would make

positive contributions if allowed to live out his natural life in prison." *Id.* at 907. It is hard to imagine that the defense could have presented the issue of life or death more poignantly. Perhaps most telling, however, the *prosecution* told the jury that it should consider Belmontes' religious experience, his future value to the community and his ability to work with other prisoners when determining his sentence. See *id.* at 910-11 (O'Scannlain, J., dissenting).

Thus, at least four aspects of the penalty phase indicate that the jury considered forward-looking evidence of Belmontes' future: (1) the "substantial" evidence regarding Belmontes' character, (2) Belmontes' personal plea for the jury to allow him to improve himself, (3) the defense *and* prosecution's directions to consider the forward-looking evidence and (4) the court's instruction to consider all evidence presented. The panel nevertheless concludes that the jury was confused about whether it should consider the evidence presented. As Judge O'Scannlain points out, this conclusion turns the entire proceeding "into a virtual charade." *Id.* at 914-15 (citing *Boyde*, 494 U.S. at 383).

C

The panel also concludes that a series of questions between individual jurors and the judge during deliberations proves that the jurors were confused. This interpretation reads far more into the exchange than existed.

After the jury had deliberated for several hours, Juror Hern asked the judge, "[t]he statement about the aggravation and mitigation of the circumstances, now, that was the listing?" The court responded, "[t]hat was the listing, yes, ma'am." She then asked, "[o]f those certain factors we were to decide one or the other and then balance the sheet?" The court answered: "[t]hat is right. It is a balancing process." Shortly thereafter, Juror Hailstone asked whether it was "possible that [Belmontes] could have psychiatric treatment during this time?" The judge

responded: "That is something that you cannot consider in making your decision."

The panel does not contend that the judge's answers were wrong. Rather, the panel concludes from this limited exchange that it is "clear that at least one juror believed that the jury should consider ... only 'those certain factors' that appeared in 'the listing.' " *Belmontes II*, 350 F.3d at 903. With all due respect to the panel, I read the judge and jury's colloquy far differently.

Juror Hern asked whether the jury should consider the "statement about the aggravation and mitigation of the circumstances." Notably, that "statement" explicitly told the jurors that the mitigating factors were nonexclusive. The judge correctly answered "yes." Juror Hern then asked if she should balance those factors. The judge again correctly answered in the affirmative. Juror Hailstone finally asked if Belmontes could have psychiatric treatment. The judge responded, once again correctly, that the jury cannot consider such testimony. *See Hughes v. Borg*, 898 F.2d 695, 700(9th Cir.1990) (noting that jurors can consider only evidence presented at trial).

Jurors are permitted under law to ask questions; the mere asking of questions, however, does not establish juror confusion. In fact, these questions just as easily show that the jury was taking its duty seriously before reaching a verdict. Appellate courts should not speculate why a juror asked a particular question.

Even if we assume, for the sake of argument, that the jurors were confused when they asked their questions, we must also presume that the jury understood the judge's answers. *See Weeks*, 528 U.S. at 234. Furthermore, even if the jurors remained confused after their discussion with the judge, he instructed the jury "to go over the instructions again." The jury returned to deliberations and did not return with further questions. "Had the jury desired further information, they might, and probably would, have signified their desire to the Court. The utmost willingness

was manifested to gratify them, and it may fairly be presumed that they had nothing farther to ask." *Armstrong v. Toler*, 11 Wheat. 258, 279 (1826). To presume otherwise "would require reversal every time a jury inquires about a matter of constitutional significance, regardless of the judge's answer." *Weeks*, 528 U.S. at 234.

The panel takes a few isolated incidents and amplifies them into a constitutional infirmity. This ignores the Supreme Court's observation that "[j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde*, 494 U.S. at 380-81. To the extent that jurors have different interpretations of the instructions, these differences "may be thrashed out in the deliberative process, with common-sense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Id.* at 381. Unfortunately, technical hairsplitting and subtle parsing of the instructions is exactly how the panel reaches its conclusion.

II

This is not the first time that courts have had occasion to examine whether Belmontes' jury was confused about its duty to consider all mitigating evidence. More than fifteen years ago, Belmontes argued to the California Supreme Court that the trial court had misinstructed the jury on the proper role of sympathy and general character and background evidence in the penalty phase. As Judge O'Scannlain notes in his dissent, Belmontes presented only character and background evidence to the jury. *Belmontes II*, 350 F.3d at 909. Belmontes' character and background thus provided the only possible basis for the jury to conclude that Belmontes could still be a productive member of society. The California Supreme Court concluded that the jury had understood its duty to consider such evidence.

In reaching its decision, the state supreme court noted that the judge had instructed the jury that "the mitigating circumstances

which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes." *Belmontes I*, 45 Cal.3d at 801 (emphasis in original). The court then noted that "[t]he prosecutor's argument reinforces our conclusion that, as instructed, the jury must have fully understood its obligation to weigh all of the defendant's mitigating evidence." *Id.* While the California Supreme Court did not examine the specific question of whether the jury considered Belmontes' potential to adapt to prison and become a constructive member of society, it did examine the broader question of whether the jury had considered Belmontes' character and background. From this examination, the California Supreme Court concluded that "no legitimate basis" existed for finding that the jury did not understand its obligations.[3] *Id.* at 802. Now, fifteen years later, the panel reexamines whether the jury considered all of the constitutionally relevant mitigating evidence.

The California Supreme Court not only reached a considered conclusion, but it had the benefit of a record that was fifteen years younger. As a federal habeas court, we "should, of course, give great weight to the considered conclusions of a coequal state judiciary." *Miller v. Fenton*, 474 U.S. 104, 112 (1985). The panel instead "strains mightily--and unpersuasively--to perceive constitutional error in the comprehensive and perfectly proper jury instructions given by the state trial judge." *Belmontes II*, 350 F.3d at 908 (O'Scannlain, J., dissenting).

III

The panel labels Belmontes' crime as not "especially heinous." In doing so, it theorizes that, given the allegedly innocuous nature of the crime, the jury would not have sentenced Belmontes to death had it understood its duties. The panel's

---

3. Notably, the district court also concluded that the jury had considered all mitigating factors. The present appeal is from this decision.

characterization of the murder greatly distorts the record.

Belmontes struck nineteen-year-old Steacy McConnell fifteen to twenty times in the head with an iron dumbbell bar, a bar that he brought with him to her house. An expert testified that the blows would have sounded "like a cracked pot." Steacy also suffered defensive injuries to her arms, legs and feet; she apparently attempted to ward off this brutal attack, but to no avail. After delivering these fatal blows, Belmontes still had the wherewithal to take Steacy's stereo equipment and explain to his accomplices simply that he "had to take out a witness." *Belmontes II*, 350 F.3d at 870. Later that day, Belmontes sold Steacy's stereo for $100 and bought some beer.

Meanwhile, Steacy's parents found their daughter lying unconscious in a pool of blood. She died shortly afterward from cerebral hemorrhaging caused by the blows to her head. This was not a simple "robbery gone wrong."

The record also presents a decidedly mixed picture of Belmontes' character and background, on which the panel relies so heavily. The jury heard testimony that Belmontes "thrived in the structured, institutional environment of prison." *Id.* at 907. They also heard that Belmontes attempted to swing a chair at another ward while he was in the structured, institutional environment of the California Youth Authority. *Id.* at 873. The jury heard that Belmontes had been "good at counseling young inmates not to repeat the mistakes that he had made." *Id.* at 907. They also heard that Belmontes pleaded guilty to being an accessory after the fact to voluntary manslaughter and that he had battered and attempted to choke his pregnant girlfriend, causing her to drop their infant daughter. *Id.* at 873.

Belmontes may have achieved occasional, moderate success in prison. The record also provided, however, ample aggravating evidence for the jury to sentence him to death. Belmontes did, after all, savagely beat an unarmed nineteen-year-old woman with a dumbbell bar and leave her to die.

IV

Capital cases are always difficult. Our system of justice asks jurors to perform the most difficult tasks imaginable: to resolve credibility, to determine guilt or innocence, and to decide between life and death. Jurors perform these duties viewing the evidence and the defendant firsthand.

This court should not now undo the deliberative process by second-guessing a decision that was squarely within the jury's province. The panel, unfortunately, does just that. It dissects a twenty-one-year-old record to second-guess the jury's decision. In doing so, it finds a "reasonable likelihood" of error where a state supreme court and a United States district court found none. It finds error by misinterpreting United States Supreme Court precedent that demands a different result. It finds error in a way that undermines finality in criminal cases by ignoring the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, 494 U.S. at 380. Simply put, the panel finds constitutional error where none exists.

For these reasons, I dissent.

BEA, Circuit Judge, with whom Circuit Judge TALLMAN joins, dissenting from denial of rehearing en banc:

I join Judge Callahan in her dissent from the denial of rehearing *en banc*. Additionally, I also respectfully dissent from the order denying rehearing en banc with the following comments:

First, the majority errs in finding that the trial court did not properly ***characterize*** Belmontes' evidence as "mitigating."

> The trial judge refused to read the most important part of the requested instruction, which stated: '[Y]ou should not

limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence.' The jury was not informed that it should consider mitigating evidence bearing on Belmontes' probable future conduct if sentenced to life in prison without the possibility of parole.... Rather than instruct the jurors that it was their duty to consider and, if appropriate, give effect to, all of the mitigating evidence presented by the defendant....

335 F.3d at 1040.

By this language, the majority determines that Belmontes' testimony and that of his witnesses ***constituted*** "mitigating evidence." A trial court cannot so instruct a jury.

The proposed instruction would have constituted a comment by the trial judge that he considered Belmontes' proffered evidence to *be* mitigating evidence. Judges are not supposed to make such comments about the evidence. The jury is the sole and exclusive judge of the credibility and weight of the evidence.[1]

---

1. The majority's proposed instruction is directly contrary to the jury instruction given triers of fact daily in California trial courts:

> You are the sole and exclusive judges of the believability of the witnesses and the weight to be given the testimony of each witness.
>
> In determining the believability of a witness you may consider any matter that has a tendency reasonably to prove or disprove the truthfulness of the testimony of the witness, including but not limited to the following:
>
> The demeanor and manner of the witness while testifying; The character and quality of that testimony; . . . The existence or nonexistence of a bias, interest or other motive; A statement previously made by the witness that is [consistent] [or] [inconsistent] with the testimony of the witness; . . .

To instruct the jury as the majority says should have been done would have constituted a charge that Belmontes' proffered evidence constituted mitigating evidence. Only where reasonable persons must accept the credibility of the evidence and its weight would such a characterization be proper. Such an instruction would amount to a directed verdict on an issue.

Such instruction also would have been argumentative. A trial judge should not pick and choose from the evidence and tell the jury what evidence to consider on an issue. That is the function of counsel.

Second, the majority repeatedly misquotes and mischaracterizes the language of "factor (k)" to narrow its application only to factors *preceding* the commission of the crime. The actual language of factor (k) is much broader; it allows consideration of evidence that predicts Belmontes' actions in jail.

The majority correctly quotes the language of "factor (k)" to allow the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," but then interprets that language to mean "petitioner's culpability for the crime he committed." 335 F.3d at 1061-62. "Most naturally read, this instruction allows the jury to consider evidence that bears upon the commission of the crime by the defendant and excuses or mitigates his culpability for the offense.... By its plain language, however, the instruction does not encompass events or considerations that are unrelated to the defendant's culpability." *Id.* at 1064.

By changing the language of the instruction from "extenuates the *gravity* of the crime ..." to "*culpability* for the crime," the majority shrinks the focus to factors which must have occurred before or at the time of the commission of the crime. But that is not an accurate reading of the phrase "extenuates the gravity of the crime." "Extenuate" means: "To lessen, to diminish; to

---

CAL. BAJI 2.20.

weaken.... To lessen or seem to lessen the seriousness (of an offense, *guilt*, etc.) by giving excuses or serving as an excuse." WEBSTER'S UNABRIDGED DICTIONARY (2d ed.1979) (emphasis added).

Indeed, "extenuate" is given a much broader meaning by factor (k) than by the dictionary: it includes something that can lessen guilt but does *not* constitute a legal excuse. For example, as I read factor (k), it would include restitution paid to the victim by a thief after he was caught.

I would suggest that the language "gravity of the crime" focuses not only on the culpability of the criminal, but includes the effect on society in general. To the extent that the criminal taunts or gloats after his crime, the gravity of the crime is enhanced. To the extent that the criminal shows remorse, repents or rehabilitates himself, the gravity of the crime is diminished.

The majority does not agree, but it disagrees *only* after changing the language of factor (k), as noted above: "Moreover, unlike in *Boyde*, 'society' has not had a 'long held view' that a defendant's likely future conduct can serve to mitigate or excuse his commission of a serious crime. Rather, the doctrine is a legal concept peculiar to capital punishment cases." 335 F.3d at 1064.

The majority is again talking about the commission of a crime, not the *gravity* of the crime. All mitigation for the *commission* of a crime must precede its execution; the circum-stances that extenuate the *gravity* of a crime do not necessarily precede its execution.

Practically all that has to be said is said quite well by Judge O'Scannlain:

> Likewise, because factor (k) allows the jury to consider Belmontes's character and background, there is no reason to think that the jury would have thought it was foreclosed from using such information to consider his future potential

> if sentenced to life in prison. As the Supreme Court has noted, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an *inevitable* and not undesirable element of criminal sentencing." *Skipper*, 476 U.S. at 5, 106 S. Ct. 1669 (emphasis added); *see Boyde*, 494 U.S. at 382, 110 S.Ct. 1190, 108 L.Ed.2d 316 ("Petitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death."); *cf. Johnson*, 509 U.S. at 370, 113 S.Ct. 2658, 125 L.Ed.2d 290.

335 F.3d at 1073.

The majority has taken a defense argument (good pre-trial conduct establishes hope for good future conduct) and elevated it into a *required instruction*. Nothing in the law requires or allows that.

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

FERNANDO BELMONTES, Petitioner, v. ARTHUR CALDERON, Respondent.	)	Civ. S-89-0736 DFL JFM MEMORANDUM OF OPINION AND ORDER

I.

Petitioner Fernando Belmontes was convicted of the first degree murder of Steacy McConnell. McConnell's parents found her unconscious on the floor of her residence in Victor, California, on Sunday, March 15, 1981. McConnell died shortly thereafter from cerebral hemorrhaging caused by 15 to 20 blows to her head with an iron dumbbell bar. McConnell suffered defensive injuries to her hands, arms, and feet, and the force of the blows to her head cracked her skull. The house had been ransacked and McConnell's stereo was missing.

A. Evidence presented at the Guilt Phase

1. Prosecution's case

Belmontes was spending the weekend in Lodi with his friend Bobby Bolanos. Both knew Domingo Vasquez, who was acquainted with McConnell. On Tuesday of the week preceding the murder, Vasquez, Bolanos, and others had spent the evening "partying" at McConnell's house. Bolanos left early Wednesday morning. When Bolanos and Belmontes ran into Vasquez that Friday, he told them that he had stolen some "black beauties" – methamphetamine pills – from McConnell and that she had

kicked him out of her house.

Bolanos testified against Belmontes at trial and pled guilty to burglary in exchange for immunity from prosecution for felony murder. Bolanos testified that on Sunday morning, he and Belmontes drove to Vasquez's house in Bolanos' car, a black 1967 Chevrolet. When they arrived, Vasquez was talking on the phone with McDonnell. After Vasquez hung up, he informed them that McConnell's parents were coming to pick her up and that she would be gone all day. Belmontes, Bolanos and Vasquez were all short of funds, and they agreed to burglarize McConnell's residence, steal her stereo, and "clean house." Vasquez's girlfriend Karrie Lynn Rogers, testified that as the men departed Belmontes carried with him an iron dumbbell bar that she used as a tortilla roller.

The three men traveled to Victor in Bolanos' car. They agreed that Bolanos and Vasquez would wait in the car a short distance from the house, while Belmontes entered the house alone to collect valuables and place them near the rear door. In accordance with the plan, Bolanos and Vasquez waited about 5 minutes before driving up to McConnell's house and backing into the driveway. Vasquez got out to open the trunk but was unable to find the right key. When Bolanos got out to help him, he heard repeated banging noises coming from within the house. Bolanos opened the trunk and then waited in the car while Vasquez walked up to the front door. Shortly after Vasquez entered the house, he and Belmontes emerged carrying stereo components. According to Bolanos, Vasquez looked "like he had seen a ghost," while Belmontes had blood on his face and his pants. Belmontes told Bolanos that he "had to take out a witness," because McConnell was home. He explained that McConnell had heard Bolanos and Vasquez drive up, and when she turned to look out the window, Belmontes hit her with the bar.

Lucy Flores, a neighbor of McConnell's, saw Bolanos' car back into McConnell's driveway on the morning of the murder.

She observed a man get out of the passenger seat and try to unlock the trunk. He appeared to have trouble with the lock, whereupon the driver got out of the car and unlocked the trunk. The driver got back in the car, while the passenger walked toward the house and met a third man. Flores did not see where the third man had come from. Shortly, she saw the two men exit the back door of McConnell's house, carrying stereo equipment, which they loaded into the trunk before getting in the car and driving off.

Bolanos testified that en route to Galt, where they intended to fence the stereo, Belmontes wiped blood off of the metal bar and his shoes. The men agreed to dispose of the bar by throwing it from a bridge into the Mokelumne river. Bolanos later led police to the spot on the river bank from which the bar was recovered. The men went to the home of Domingo's brother, Manuel Vasquez, where Belmontes changed into a borrowed pair of pants. Raul Barron was contacted, and met the men at the home of Irma Vasquez, Domingo's sister. Barron purchased McConnell's stereo components for $100. Barron testified that he paid the $100 to the man in the baseball cap (Belmontes), who did most of the talking during the transaction.

Bolanos' girlfriend, Teresa Cobarrubio, testified that Bolanos gave her $15 that same day from the proceeds of the sale of the stereo. Bolanos appeared scared, and told Cobarrubio that he, Belmontes, and Vasquez had burglarized McConnell's home. The following day, Bolanos and Cobarrubio read a newspaper account of McDonnell's murder, and Bolanos related further details of the crime. He told Cobarrubio that he had remained in his car and that Belmontes had exited from the house with blood all over his clothes and stated that he "had to take a witness out."[1/]

---

1. Cobarrubios also testified that she recalled running into Barbara Murillo, Belmontes' girlfriend, at the Grape Festival several months after the murder. Murillo asked if Belmontes had committed the murder. Cobarrubio

The day after the murder, Vasquez called Bolanos to advise that he had been questioned by the police in relation to McConnell's murder. Bolanos and Belmontes went to Vasquez's house and talked in the living room. Carrie Lynn Rogers, Vasquez's girlfriend, who subsequently married him, and who was a cousin of Bolanos', testified that from the kitchen she overheard the men discussing the crime, and, specifically, that she heard Belmontes describe how he had entered the house alone and hit McDonnell multiple times with the bar before Vasquez joined him in the house.

After the meeting at Vasquez's house, Belmontes phoned his girlfriend, Barbara Murillo. Murillo testified that he told her he was in trouble. He said that he had gotten into an argument with McDonnell at her house, become angry, and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep." (RT 1710:20-1711:17.)

Petitioner fled to Southern California, where he was arrested pursuant to a warrant six days after the murder. Blood found on one of his shoes was tested and found to match McConnell's blood type.

Belmontes furnished three tape-recorded statements to police in the three days after his arrest. He initially denied any involvement in a plot to burglarize McConnell's house.[2/] In the

---

responded affirmatively. Murillo then asked if she thought Belmontes "might have been set up." Cobarrubio replied: "well, he might have." Cobarrubio testified that she had no information that suggested Belmontes had been set up, but answered as she did because she felt sorry for Murillo. (See RT 1489-1495.)

2. While speaking with Detective Holman, Belmontes denied having been at McConnell's house after the end of February, and specifically denied having planned to burglarize her home on the morning of March 14:

Holman: Let me ask you this: Do you remember being over at

second session, he admitted to the burglary, and acknowledged having entered the house alone, but denied having hit McConnell. In his third statement to police, Belmontes admitted to having hit McConnell, but insisted that he did so only once, on the right side of her head, and only after Vasquez entered the house and told him to. Belmontes stated that the first blow caused McConnell to fall down, and that he then proceeded to search the house for valuables, leaving Vasquez alone with McConnell.

Belmontes was unable to explain how McConnell acquired the additional 14 to 19 bludgeoning injuries on the left side and back of her head, and expressed disbelief that she had been hit so many times.[3/] He stated at one point that Vasquez had hit McConnell, but elsewhere in the same session told police that he did not see or hear Vasquez strike McConnell during the time that he was searching the apartment. (See RT 1819:3-8;

Domingo's house on Sunday morning and talking about going over to Steacy's house to rip her off?

Belmontes: Sunday morning?

Holman: Yeah. Last Sunday morning.

Belmontes: Rip her off?

Holman: Yeah.

Belmontes: Huh uh. (Negative) Wasn't talking about that or nothing.

(RT 1784:18-27.)

3. The transcript of Belmontes' third police interview contains the following exchange:

Holman: Let me ask you; you know I am having a hard time figuring out how she got so many blows on her head.

Belmontes: Hey that freaked me out.

Holman: By the same weapon, I mean they appear to be all caused by the same weapon. I don't know, what do you think happened?

Belmontes: I really don't know man. That shocked the shit yesterday when you told me that it was about 20 times . . . I can sincerely say that I didn't get her no damn 20 times.

(See RT 1848:6-22.)

1850:22-1851:5.) Belmontes admitted that he had gotten blood on his pants, that he had not seen any blood on Vasquez, and that only he had changed pants when they arrived at Manuel Vasquez's house. (RT 1861:2-19.)

The pathologist who performed the autopsy on McConnell, Dr. Maduros, testified that the first blow, to McConnell's right temple, was of much less force than the others, and likely was of insufficient force to render her unconscious. (See RT 1751:7-1753:8; 1759:15-26.) Dr. Maduros also testified that McConnell had defensive injuries on her hands, arms, and feet, which indicated that she had been conscious through some portion of the attack after the first blow. (See RT 1754:2-1756:14.)

2. Defense case

Belmontes' theory at trial was that Vasquez was the killer, and that he must have dealt the additional blows to McConnell while Belmontes was searching the back rooms of the house. Belmontes testified that after he, Bolanos and Vasquez agreed to steal McConnell's stereo, they drove to Victor and parked a block away from McConnell's house. Belmontes walked to McConnell's house and knocked on the door. He stated that when she answered the door, he abandoned his intent to burglarize the house, but entered at her invitation to avoid arousing suspicion. Belmontes and McConnell stood by the table talking while she ironed clothes.

Five minutes after Belmontes entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Belmontes followed behind her. Vasquez rapped on the door. According to Belmontes, the sequence of events was such that, after pulling up, Vasquez must have promptly come to the front door; under Belmontes' version, Vasquez would not have had time to go to the trunk of Bolanos' car, as both Bolanos and the neighbor, Lucy Flores, testified.

Vasquez pushed the door open, saw McConnell, and ordered Belmontes to "hit her." Belmontes did as he was told, and hit McConnell in the side of the head with the bar. She fell to the floor, and Belmontes dropped the bar. Belmontes then ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room. Upon returning to the front of the house, Belmontes saw Vasquez standing in the same spot holding the metal bar. He had not seen Vasquez hit McConnell nor heard any blows landing, because he was not paying attention. He could not explain the presence of defensive bruises and contusions on McConnell's hands, arms, and feet.

Belmontes and Vasquez exited the house carrying McConnell's stereo components, which they placed in the trunk of Bolanos' car. Vasquez got in the back seat, and Belmontes rode in the front, next to Bolanos, who drove. Belmontes testified that Vasquez handed him the steel bar, stating that he had to take out a witness. The bar had blood, flesh and hair on it. Petitioner wiped blood off the bar using his gloves and set it down on the floor. He denied having wiped any blood off of his shoes. Bolanos and Vasquez told him to throw the bar out his window into the river, and he complied.

The three drove to Manuel Vasquez's house, where Belmontes changed into a pair of Manuel Vasquez's pants because his had blood on them. After selling the stereo to Raul Barron for $100, the three men drove to Lodi, divided the money, and bought some beer. They drove to Domingo Vasquez's house, where Vasquez allegedly changed his pants. They then drove to the home of an acquaintance to purchase narcotics.

Belmontes' girlfriend, Barbara Murillo, testified that she ran into Cobarrubio at the Grape Festival six months after the murder. Murillo testified that she believed at the time that Belmontes was the murderer. But when she asked Cobarrubio for further details about the crime, the latter claimed that Belmontes had been "set up" because he had no backup in the area, while Vasquez had a network of local friends.

The jury convicted Belmontes of first degree murder, and made special findings that Belmontes personally committed the murder, that the murder was wilful, deliberate, premeditated, and intentional, and that the murder occurred during the commission of the crime of burglary. The case then proceeded to the penalty phase.

B. Evidence presented at the penalty phase

1. Evidence in aggravation

At the penalty phase, the prosecution introduced evidence of (i) Belmontes' acquisition of a handgun by threat, in 1979; (ii) his carrying the gun for protection shortly thereafter; (iii) his April 1979 conviction as an accessory after the fact to voluntary manslaughter; (iv) an altercation with another inmate during Belmontes' incarceration in a county youth facility; (v) a domestic assault on Barbara Murillo in the month preceding McConnell's murder; and (vi) autopsy photographs depicting McConnell's fatal injuries.

(i) Acquisition of the handgun

William Cartwright, the manager of a motel in Ontario, California, testified to an incident in early 1979 in which an individual identified as Rudy met Belmontes at the motel and offered to sell him a .32 caliber automatic handgun that he had acquired in a burglary. Belmontes examined the loaded weapon, and then cocked the trigger and pointed it at Rudy, stating: "I've got it now. Why buy it?" Rudy left the premises and Belmontes retained the weapon.

(ii) Carrying the gun

Steven Cartwright testified that he had a conversation with Belmontes in February 1979 in which Belmontes stated that some people were upset with him. As Belmontes said this, Cartwright testified, he indicated that he had a gun in his belt, by

slapping his side, and stated that he was not concerned because he had all the protection he needed.

(iii) Prior conviction

The prosecution and defense stipulated that Belmontes pled no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter, in the death of a Jerry Howard.[4/]

(iv) Altercation with other inmate

In May 1979, defendant was a ward in a California Youth Authority facility under the supervision of group counselor Ron Cutler. Cutler testified to an incident in which he observed Belmontes and another ward preparing to fight. Cutler testified that Belmontes, who was significantly smaller than the other youth, was about to hit the other with a chair when Cutler intervened and knocked the chair away.

(v) Domestic violence

In February 1981, Belmontes was living with his two year old daughter and the girl's mother, Barbara Murillo, who was then four months pregnant with their second child. Murillo testified to an argument that escalated into an altercation between Belmontes and Murillo when Murillo told Belmontes to leave their apartment. Belmontes pushed Murillo and hit her in the head, at one point causing her to drop their daughter. After

---

4. The court did not permit the prosecutor to introduce evidence that Belmontes had actually murdered Jerry Howard, execution-style. (See RT 2239:1-3; 2262 16-18.) The prosecutor's proffer included: (i) testimony from an eyewitness who was prepared to testify that he saw Belmontes shoot Howard; (ii) testimony from a counselor at a California Youth Authority camp that Belmontes had confessed to killing Howard after receiving parole for his accessory conviction; (iii) testimony from another individual who had seen Howard get into a car with Belmontes on the evening he was killed; and (iv) testimony from a police officer who found the murder weapon at Belmontes' house. (See RT 2239:8-2240:27; 2261:10-25.)

pushing her to the ground, Belmontes attempted to choke her, before the two were separated by friends who were present. When Murillo started to call the police, Belmontes cut the telephone cord with a knife. Murillo at one point fled the apartment through a window, but Belmontes dragged her back to the vicinity of the apartment. A neighbor eventually summoned police, who arrived as Belmontes was leaving the apartment.

2. Evidence in mitigation

Belmontes' maternal grandfather, Michael Salvaggio, testified that his daughter was sixteen when she married Belmontes' father. Belmontes' father was unemployed, and unable to support his family, requiring extensive financial support from Salvaggio. When Salvaggio got the elder Belmontes a job, he was still unable to support his family because he "drank it away." (RT 2315:1-10.) Salvaggio characterized Belmontes' young life as "terrible," and marked by physical abuse of Belmontes' mother, including a broken arm. (RT 2315:11-2316:2.) Salvaggio also testified that Belmontes had a wonderful relationship with his grandmother, who died in 1978. After Belmontes' grandmother nearly drowned while swimming, she lingered in a coma for two weeks before dying, and Belmontes visited her almost every day in the hospital.

Belmontes' mother, Carol Belmontes, testified that her marriage to Belmontes' father was an unhappy one. He "wouldn't ever work," and was an alcoholic, who beat her. (RT 2324:18-26.) he broke her arm once, and stabbed her on another occasion. Mrs. Belmontes' marriage to him lasted about 11 years, and she remarried after she and Mr. Belmontes were divorced. Her second marriage broke up five years later, when Belmontes was fifteen. After that, he became hard for her to control.

Mrs. Belmontes testified that Belmontes had remained very close to her and to his sister. Mrs. Belmontes' testimony concluded with the following exchange:

Q: What kind of qualities can you recommend to this jury as they consider his faith [sic]?
A: I don't believe that he should go to the gas chamber.
Q: Just because you're his mother?
A: No. I don't believe he did it.
Q: Are you aware of the facts of this case?
A: (Affirmative nod) I know my son.

Mr. Schick: I have no more questions.

(RT 2327:16-20.)

Robert Martinez, a close friend of Belmontes' since their early teens testified on Belmontes' behalf. He testified that he and Belmontes spent a great deal of time together, working on Martinez's low rider car, and occasionally smoking marijuana and drinking beer. Belmontes served as best man at Martinez's wedding, and was someone who Martinez would go talk to when he had problems with his wife.[5/]

Martinez's wife Darlene testified that she considered Belmontes a close friend. She was a born-again Christian. When Belmontes visited with Mr. and Mrs. Martinez after his release from the California Youth Authority, he advised her that he too was a born-again Christian. He also mentioned his struggling relationship with Murillo and expressed concern that she was not Christian.

Belmontes testified in his own behalf. He testified that his father used to hit his mother frequently, and often came home

---

5. Martinez testified that Belmontes was not a violent person. However, that testimony was stricken, on objection from the prosecutor, who argued that if Martinez's opinion evidence were admitted then the prosecutor should be permitted to introduce evidence of Belmontes' participation in gang violence and his alleged execution-style killing of Harmon.

drunk. Although he acknowledged the difficulties in his childhood, Belmontes indicated that he did not want to use his childhood "as a crutch, to say I am in a situation right now, I'm here because of that." (RT 2343:25-27.) Belmontes testified about his time in the California Youth Authority Pine Grove Camp, and his acceptance of Christianity through his involvement in the M-2 Christian sponsorship program. Belmontes testified that he initially entered that program as a way to get occasional time away from camp, but that he was touched by the decency of his M-2 family, the Haros, and so gradually became curious about Christianity and eventually embraced it. Belmontes testified that, although initially ranked as a the last man on the fire crew, he managed to work his way up to number 2 man after his involvement withe the M-2 program helped him to "straighten my head out." (See RT 2347:27-2348:17; 2355:3-9.) After his parole from the Youth Authority, Belmontes got a job with the United States Forest Service and rented an apartment with Barbara Murillo near Lodi, in part so that he could be near his M-2 sponsors, Fred and Beverly Haro. Belmontes testified that he had trouble maintaining his religious commitment from that point on, and started "going back to [his] old ways." Belmontes testified that, if sentenced to prison, he planned to "get into music," "read a lot," and "just try to stay alive." (RT 2357:24-2359:26.)

The Reverend Dale Barrett testified that he knew Belmontes from Belmontes' participation in the M-2 program, under which an inmate at the Youth Authority facility would be matched with a local family and spend time in the family's home on Wednesday and weekends. Barrett matched Belmontes with the Haros. Belmontes participated in church activities "to a very high degree," (RT 2379:24-25), and was "one of the more sociable young men involved in the church." (RT 2380:1-2.) Belmontes was eventually baptized during his time in the Youth Authority camp. Barrett testified that his church is very selective about baptism, and that it is based on "how serious we feel they are about the commitment they have made." (RT 2380:15-2381:5.) Only a small percentage of participants are baptized.

Barrett felt that Belmontes' participation in the program and religious conversion was sincere, and that Belmontes was not among those participants who are motivated primarily by the desire to get away from the camp. Barrett testified that he believed in the death penalty, but thought it inappropriate in this case because he saw Belmontes as "salvageable," (RT 2384:1-11), and because he thought premeditation "a debatable point" in this case.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and the Northern California Director of the M-2 program testified that Belmontes had been helpful to the program on several occasions since his release from Pine Grove, when he visited Preston and spoke with wards there about "what it was like on the outside," to help prepare them for release. Miller testified that if Belmontes were imprisoned for life, he anticipated using Belmontes to counsel "other men in the prison so that other fellas when they get out don't get into the same thing that he has gotten into." (RT 2397:5-7.)

The Haros testified to their relationship with Belmontes when he was incarcerated at Pine Grove and after his release. Belmontes was in their home for three days each week for much of the year he spent at Pine Grove. Fred Haro spent quite a bit of time talking with Belmontes, "about his home, his life, what his plans were, where he was going, what he wanted to do, and that kind of counseling." (RT 2402:25-27.) Haro testified that Belmontes responded very well to the program, and that Belmontes had been a very good influence on the Haros' teenage son, who was experiencing some problems. Fred Haro also testified that he was "strongly for the death penalty" but believed that it was inappropriate in this case because he believed that Belmontes was innocent. Beverly Haro testified that she saw Barbara Murillo as a "definite negative factor in Fernie's life." (RT 2416:6-26.)

C. Procedural History

Belmontes was convicted of first degree murder on August 6, 1982. On October 6, 1982, the court sentenced Belmontes to death. On June 23, 1988, the California Supreme Court affirmed the judgment. See People v. Belmontes, 45 Cal.3d 744, 248 Cal. Rptr. 126 (1988). The United States Supreme Court denied Belmontes' petition for writ of certiorari on January 13, 1989. See Belmontes v. California, 488 U.S. 1034, 109 S. Ct. 848 (1989) (Mem.).

Belmontes filed a petition for writ of habeas corpus with this court in May, 1989. Later that year, petitioner filed a state habeas petition and received a stay of execution from the California Supreme Court. This case was administratively closed during petitioner's state court proceedings. On June 29, 1993, this case was reopened. On February 16, 1994, petitioner filed an amended petition . On November 4, 1994, petitioner filed a second amended petition. In May 1995 the court denied respondent's motion to dismiss.

The second amended petition asserts 23 claims, in two parts. Part A asserts 14 claims related to the guilt phase, and Part B asserts 9 claims related to the penalty phase. On July 24, 1995 petitioner filed a motion for summary judgment on the following claims: A-5 through A-7, A-9, A-13, A-14, B-2 through 5, B-7, and B-8. Respondent opposed the motion and filed a cross motion for summary judgment on August 25, 1995. On September 30, 1996, the Magistrate Judge denied petitioner's motion for an evidentiary hearing on certain other claims, whereupon petitioner filed a memorandum of law seeking summary judgment on claims A-1 through A-4, and B-1. (See Mem. Points and Authorities, filed November 6, 1996, at 2 (characterizing petitioner's motion as "the functional equivalent of a summary judgment motion").) Respondent opposed the motion and moved for summary judgment.

On February 1, 2000, the court withdrew the referral of this case and the pending motions from the assigned magistrate judge. The court now denies petitioner's motions for summary

judgment, and grants respondent's motion. The petition is therefore denied with respect to all claims except the six that the parties have not yet briefed, claims A-8, A-10 through 12, B-6, and B-9.

II.

Belmontes seeks summary judgment on ten claims arising out of his guilt phase trial and seven claims arising out of the penalty phase.

A. Guilt Phase

1. Claim A-1

Belmontes argues that he was deprived of due process by the prosecutor's failure to disclose material benefits conferred on Bobby Bolanos, and by the prosecutor's failure to correct false or misleading testimony by Bolanos about those benefits. According to Belmontes, the prosecutor arranged for the dismissal of drunk driving charges arising out of an incident that occurred one week prior to the murder of Steacy McConnell. Defense counsel was not informed of the dismissal of these charges before trial, which may have violated the prosecutor's duty to disclose benefits conferred on witnesses in exchange for cooperation. See Giglio v. United States, 405 U.S. 150, 153-54, 92 S. Ct. 763, 766 (1972); Singh v. Prunty, 142 F.3d 1157 (9th Cir. 1998).

The evidence of the dismissal of drunk driving, hit and run, and other charges against Bolanos could have been used to impeach Bolanos, and thus should have been disclosed. See Singh, 142 F.3d at 1161.[6] The prosecutor's failure to disclose

---

6. It is undisputed that the dismissal of Bolanos' drunk driving and hit and run charges was secured by Mr. Sueyres, the prosecutor in Belmontes' case. Respondent argues that the prosecutor was under no duty to disclose the dismissal of the traffic offenses because the dismissal was not

the benefits given to Bolanos in exchange for his testimony, however, violated Belmontes' right to due process only if the undisclosed evidence was material. See Singh, 142 F.3d at 1161. "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985).

On this record, there is not a reasonable probability that had the prosecutor disclosed the evidence in question, the result of the trial would have been different. In contrast to Singh, it was already clear to the jury here that Bolanos had received significant benefits form the prosecutor, and that he was not testifying out of altruism. Cf. Singh, 142 F.3d at 1162. Although Bolanos could have been prosecuted for felony murder, the jury heard the details of his plea agreement, and defense counsel impeached him on cross examination with the fact that murder charges against him had been dismissed in exchange for his testimony and his guilt plea to a burglary charge. The additional impact on his credibility of disclosure of the dismissal of relatively minor misdemeanor traffic charges could not have amounted to much.

Belmontes argues that the prosecutor's failure to disclose was compounded by Bolanos' false or misleading testimony about the dismissals and about his previous arrest record. A prosecutor must correct testimony given by a prosecution witness that the prosecutor knows to be false or misleading. See United States v. Bagley, 473 U.S. 667, 678, 105 S. Ct. 3375, 338-82 (1985). When asked about an inconsistency[7] between his trial testimony

---

part of the consideration for Bolanos' testimony, but was a gratuitous act on the part of the prosecutor. (See Return at 54-68.) However, so long as Bolanos knew or suspected that he was receiving a benefit from the prosecutor, the evidence could be impeaching, whether or not the benefit was part of the plea bargain.

7. The inconsistency concerned the length of time that Belmontes was in the house alone. Although Bolanos initially told the police it was 20-

and his first statement to police, Bolanos explained it by saying that "I didn't have my head straight [during the interrogation] . . . there was a lot of investigators there . . . and the DA and you know, cops and whatever. That's the first time I got busted. I wasn't even thinking then." (RT 1449:28-1450:5.) This statement may have been untrue, depending on what Bolanos meant by "busted."

The prosecutor in Belmontes case, Clark Sueyres, knew of Bolanos' arrest for drunk driving, as Sueyres personally appeared in court to dismiss the drunk driving charges against Bolanos, in which Bolanos had been arrested just a week before his arrest and interrogation in the McConnell murder. Sueyres was thus under a duty to correct Bolanos' statement that his second arrest in one week's time was "the first time I got busted." Although this correction, if made, may have helped to impeach Bolanos, the impeachment on a minor point would not have been significant.

In light of the other, overwhelming evidence of Belmontes' guilt, the failure of the prosecutor to correct the misleading statement or disclose the dismissal of the drunk driving charge was harmless beyond a reasonable doubt. Petitioner seeks to portray the trial as little more than a swearing contest between him and Bolanos as to whether Belmontes or Vasquez was the perpetrator of the fatal blows, but, in fact, other evidence supported Bolanos' testimony, and undercut Belmontes'. First, Bolanos testified that after he pulled into the driveway, Vasquez exited the car, and tried to open the trunk. Vasquez could not find the right key, and Bolanos eventually had to help him, after which Vasquez went up the porch steps and into the house. Bolanos' testimony was substantially corroborated by the testimony of McConnell's neighbor, Lucy Flores, who watched the passenger get out of Bolanos' car and try unsuccessfully to open the trunk, eventually prompting the driver to come to his

---

30 minutes, at trial, he testified that it was about five minutes. (See RT 1449:20-1450:6.)

assistance. Belmontes, however, testified that for his version of events to be true, Vasquez must have come to the door immediately after Bolanos' car pulled into the driveway, and that

Vasquez "didn't have time to open the trunk." (See RT 2023:8-13.) Second, Dr. Maduros, the pathologist, testified at trial that the blows that cracked McConnell's skull would have made a sound "like a cracked pot." (RT 1748:21.) This testimony was consistent with Bolanos' testimony that when he and Vasquez were opening the trunk, he heard a repeated "banging noise" coming from inside the house. (RT 1391:22-28.) Belmontes testified that he had hit McConnell once with the iron bar, and then dropped the bar, leaving McConnell alone with Vasquez while he searched the back bedroom and kitchen area. Yet Belmontes testified that he had heard no unusual sounds while he was searching the small home. (See (RT 19999:16-21.) Third, Belmontes was unable to explain how McConnell acquired the extensive defensive injuries on her hands, arms, and feet if, as he said, he knocked McConnell unconscious with one blow, and Vasquez subsequently delivered the fatal blows to her head. Moreover, Dr. Maduros' testimony was inconsistent with Belmontes' claim that his single blow to the right temple knocked McConnell unconscious. (See RT 1759:15-26.) Finally, there was no dispute that it was Belmontes who took the murder weapon into McConnell's home, emerged covered with blood, unlike Vasquez and Bolanos, negotiated the sale of the stolen items, and gave false exculpatory statements to the police. In short, there is no reasonable likelihood that impeachment regarding Bolanos' "first time I got busted" comment or the dismissal of drunk driving charges would have led the jury to believe Belmontes' incredible tale over Bolanos' which was corroborated in crucial respects by other witnesses and physical evidence.

2. Claim A-2

Belmontes argues that he was deprived of due process by the

prosecution's use of inculpatory statements that were allegedly involuntary because of police coercion. According to petitioner, the police made threats about the death penalty if he did not confess and offered the hope of leniency if he did.

Petitioner made three separate statements to police after his arrest, two while in jail in Ontario, California, and one after he was returned to San Joaquin county. The statements were tape recorded. This claim is based on Belmontes' allegation that the police detectives who interrogated him made threats regarding the death penalty or promises of leniency during the two to three minute interval between his first and second tape-recorded statements, and thereby rendered his subsequent statements involuntary. The transcripts of petitioner's tape recorded statements to police, however, directly contradict the claim that the police made either threats or promises to induce Belmontes to talk. At the beginning of petitioner's second statement, petitioner expressly stated that the detectives had not threatened him, and had not promised him anything, and that they were resuming the interview at his request. (See RT 1799:1-1800:4.)

Based on this evidence, the California Supreme Court held that "our independent review convinces us that no improper threats or promises of leniency were made to defendant. Deputy Holman testified that he did not, as defendant contends, 'threaten him with the death penalty.' Deputy Cooper's best recollection was that the term 'death penalty' may have been mentioned at some point, but that if it was, it was not done so with intent to scare or coerce defendant into confessing." People v. Belmontes, 45 Cal.3d 744, 248 Cal. Rptr. 126, 140 (1988). Moreover, the Court held, "defendant's own responses at the beginning of his second tape-recorded statement support the officers' testimony that he was not 'threatened' with the death penalty, nor were any promises of benefit or leniency offered as inducement for his statements." (Id.) Although the ultimate issue of voluntariness may be viewed as a mixed question of law and fact, warranting independent review under the Pre-AEDPA version of § 2254(d), cf. Thompson v. Keohane, 516 U.S. 99, 106, 116 S. Ct. 457, 462

(1995), the state Supreme Court's underlying factual finding – that no improper threats or promises were made – is a pure factual finding, entitled to deference. Id.; see also Townsend v. Sain, 372 U.S. 293, 306 n.6, 83 S. Ct. 745, 756 n.6 (1963).

3. Claim A-3

Petitioner argues that he was deprived of the effective assistance of counsel by his attorney's failure to challenge the validity of the arrest warrant and the seizure of his blood-stained shoes at the time of arrest. Petitioner argues that the affidavit filed in support of the arrest warrant lacked probable cause, because it was based solely on the "inherently unreliable" statement of an accomplice, Bobby Bolanos, and because it omitted material facts. (See 1996 Mem. in Supp. at 9; Traverse at 17-19.) Because petitioner's claim is based on ineffective assistance of counsel, he must show that counsel's failure to bring a motion to suppress on these grounds fell below "the wide range of professionally competent assistance." Strickland, 466 U.S. at 690, and that he suffered prejudice as a result. See Lowry v. Lewis, 21 F.3d 344, 346 (9th Cir. 1994).

Although an accomplice's motives are often suspect, "even if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." Gates, 462 U.S. at 234, 103 S. Ct. at 2330. An affidavit based on an informant's statement supplies probable cause where "corroboration through other sources of information reduced the chances of a reckless or prevaricating tale, thus providing a substantial basis for crediting the hearsay." Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317 (1983) (citations and internal quotation marks omitted). Here, as the California Supreme Court noted on direct appeal, "the circumstances of the crime scene - as summarized in the affidavit - corroborated Bolanos' statements." People v. Belmontes, 45 Cal.3d 744, 768 248 Cal. Rptr. 126, 137 (1988). The affiant indicated that McConnell's

house had been "ransacked," and Bolanos stated that the murder had taken place during a burglary. The autopsy report that was incorporated into the affidavit indicated that McConnell's death was caused by "blunt trauma to the head," and Bolanos stated that defendant had beaten the victim with an iron bar. The detailed, first hand nature of Bolanos' description of the crime was sufficient to establish probable cause for the issuance of a warrant. Because the affidavit established probable cause for the issuance of the warrant, Belmontes had not established either deficient performance or prejudice.

Second, petitioner argues that material information was omitted from the affidavits which might have caused the judge who issued the warrant to question Bolanos' credibility. The primary fact identified by petitioner in this regard is that McConnell's neighbor, Lucy Flores, had seen Bolanos' car at the place and time of the crime. It is not obvious that this fact would diminish Bolanos' credibility. Petitioner suggests that it would show that Bolanos was "a cooked goose," but the judge knew this already, in light of the statements recounted in the affidavit in which Bolanos confessed his involvement in a felony, the burglary of McConnell's house, that resulted in a murder. Indeed, had the affidavit fully recounted the information provided by Flores, it would have provided further corroborating detail, such as the fact that Bolanos remained with the car, and never entered McConnell's home. Similarly, had the affidavit included details of Teresa Cobarrubio's statement to police, it would have reinforced, not undermined, the version of events provided by Bolanos, by showing a prior consistent statement on Bolanos' part. In sum, none of the omissions identified by petitioner undermine the judge's finding of probable cause.

4. Claim A-4

Belmontes argues that he was deprived of due process and the effective assistance of counsel due to a conflict of interest that resulted from his counsel's prior representation of Mr. Vasquez. Before the cases against Belmontes and Vasquez were severed

for trial, Vasquez's counsel moved to disqualify Schick as counsel for Belmontes, on the basis of a possible conflict of interest, because a member of Schick's firm had represented Vasquez in a 1979 murder charge that had been dismissed. Schick filed a declaration stating that he knew no confidential information concerning the murder charge, he had not appeared on behalf of Vasquez in that case, and the file in the murder case had been destroyed over eight months earlier. The state court denied the motion, noting "the lack of real contact Mr. Schick had or anyone in his office has had that has remained in the office with Mr. Vasquez." (Add. RT at 105:13-108:16.)[8/] The subsequent investigation by Belmontes' habeas counsel has revealed that the prior representation of Vasquez was more extensive than Schick disclosed at the time of Vasquez's motion. Seven years before Belmontes' trial, Schick himself had represented Vasquez at the preliminary hearing stage of a firearm prosecution of Vasquez, when Schick was a deputy public defender. Schick does not remember the facts of the case or any discussion with Vasquez. Moreover, both of Schick's former partners in the law firm of Riddle, Schick and Jacobsen also represented Vasquez while working as deputy public defenders prior to the formation of the partnership. Mr. Riddle represented Vasquez in a 1974 rape case, and Mr. Jacobsen represented him in a 1976 robbery prosecution. Schick was not aware of the rape case during his representation of Belmontes. However, Schick did remember at the time of the recusal hearing that he and Jacobsen had both represented Vasquez when they were in the

---

8. Although Belmontes waived any objection to the conflict, he now argues that trial counsel's failure to disclose the extent of the conflict invalidates the waiver. "Waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case upon the particular facts and circumstances surrounding that case." Id. The context of Belmontes' waiver establishes that he was unaware of "the significance of the conflict," id. at 1500, because he did not realize that Schick had personally represented Vasquez, even though the representation was at a preliminary stage and involved a distinctly different matter. Thus, his limited waiver does not bar this claim.

public defender's office, but he did not volunteer that information to the court or to Belmontes, apparently on a view that these matters were too remote and unrelated to be of relevance. (See Respondent's Exhibits in Support of Return, Exh. C at 3:10-25; 6:1-6.)

Although Schick's primary theme at trial was that Vasquez was the actual killer, Belmontes claims that Schick pursued this defense half-heartedly, relying on the "safe harbor" of evidence produced by the police investigation into the crimes, rather than independently investigating Vasquez's background. According to Petitioner, "there existed a substantial corpus of evidence which would have strongly supported petitioner's trial defense but which was potentially adverse to Vasquez's legal interests, and . . . that evidence was neither disclosed by trial counsel to the court, nor was it investigated or presented to the jury." Specifically, Belmontes argues that Vasquez had a history of retaliatory violence that could have been used to impeach Bolanos with respect to a possible motive for falsely pinning the murder on Belmontes.[9] Thus, according to Belmontes, had he been permitted to present character evidence as to Vasquez, he could have impeached Bolanos.

The Sixth Amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence, and the right to counsel's undivided loyalty. Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988) (citations omitted). "To establish a sixth amendment violation based on a conflict of interest the defendant must show 1) that counsel actively represented conflicting interests, and 2) that an

---

9. The California Supreme Court found that there was no actual or potential conflict of interest, and rejected petitioner's argument that Schick's representation of petitioner may have been compromised, noting that the primary defense theory at trial was that Vasquez was the ringleader. See 248 Cal. Rptr. at 141-42. The court noted that Vasquez's criminal history would not likely have been admissible, and concluded that "the record contains no informed basis for concluding that a conflict of interest existed or affected trial counsel's performance to defendant's detriment." Id.

actual conflict of interest adversely affected his lawyer's performance." Id.; see also Cuyler v. Sullivan, 446 U.S. 335, 348-50, 100 S. Ct. 1708, 1718-19 (1980). Unlike a challenge to counsel's competency, prejudice is presumed if the defendant demonstrates that counsel "actively represented conflicting interests," Cuyler, 446 U.S. at 350, 100 S. Ct. at 1719, and that such an "actual conflict of interest adversely affected his lawyer's performance." Id. at 348, 100 S. Ct. at 1718; see also Strickland v. Washington, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984).[10/]

Once a petitioner has shown that an actual conflict existed, "the defendant need only show that some effect on counsel's handling of particular aspects of the trial was 'likely'." Miskinis, 966 F.2d at 1268. Failure to put on a certain defense or particular witnesses may constitute "adverse impact' under Cuyler unless the record demonstrates that a non-conflicted counsel would not have put on that defense or those witnesses. Miskinis, 966 F.2d at 1268-69.

---

10. The Court has adopted a "fairly rigid rule of presumed prejudice for conflicts of interest." Strickland, 466 U.S. at 692, 104 S. Ct. 16 2067, because:

> . . . a rule requiring a defendant to show that a conflict of interests . . . prejudiced him in some specific fashion would not be susceptible of intelligent, even-handed application. In the normal case where a harmless-error rule is applied, the error occurs at trial and its scope is readily identifiable. Accordingly, the reviewing court can undertake with some confidence its relatively narrow task of assessing the likelihood that the error materially affected the deliberations of the jury. But in a case [involving a conflict of interest] the evil-it bears repeating-is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.

Holloway v. Arkansas, 435 U.S. 475, 490, 98 S. Ct. 1173, 1181-82 (1978); see also Miskinis, 966 F.2d 1263, 1268 (9th Cir. 1992).

In this case, the claim is not that Schick failed to present the defense that Vasquez was the actual killer; that was, in fact, Schick's primary defense theme. Rather, the claim is that Schick did not do enough to attack Bolanos' credibility by presenting him as fearful of Vasquez. But the record does not support this assertion. Defense counsel attempted to impeach Bolanos on every conceivable front. He asked questions designed to show that Bolanos was a friend and family member of Vasquez's family but was not frightened of Belmontes', and that Bolanos' true objective was to save his own hide. [11/] It is unreasonable speculation that Bolanos would have been further impeached by evidence of Vasquez's criminal record or past. The court finds no "adverse effect," with Cuyler, on this ground.

Belmontes' claim also founders on the "actual conflict" requirement. Generally, it is more difficult to show an actual conflict resulting from successive rather than simultaneous representation. See Mannhalt v. Reed, 847 F.2d 576, 580 (9th Cir. 1988). See also United States v. Wheat, 813 F.2d 1399, 1402 & n.1 (9th Cir. 1987) ("in successive representation, conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties so that he is incapable of diligently representing his client."). Although Schick remembered that he had once represented Vasquez, he did not recall "the specific charges or the disposition," and the record is devoid of evidence that Schick divided his loyalties such that he was incapable of diligently representing his client. The earlier representation was entirely unconnected to the McConnell murder. On this record, therefore, the court cannot conclude that Schick actively represented conflicting interests. Where the alleged conflict arises out of successive representation, and the prior representation was completely

---

11. In response to the questions designed to show intimidation or bias, the prosecutor brought out on redirect that Bolanos already had testified against Vasquez in a separate prosecution of Vasquez for the McConnell murder. (See RT 1476:1-12.)

unrelated and petitioner has not shown that any privileged information as either divulged or withheld, or that counsel's loyalties were divided, "no actual conflict existed." Mannhalt, 847 F.2d at 580.

Finally, petitioner argues that the trial court's failure to adequately investigate when it received notice of the possible conflict requires automatic relief under Holloway v. Arkansas, 435 U.S. 475 (1978). But Holloway is not applicable here. In that case, the state court rejected appointed defense counsel's repeated assertions that the interests of his co-defendant clients were adverse. Here, the court made appropriate inquiry of Schick when made aware of the potential conflict arising out of the prior representation of Vasquez by another member of Schick's firm. While the Sixth Amendment requires a trial court to investigate known conflicts, Belmontes has offered no authority for the proposition that the trial court's knowledge of facts giving rise to one potential conflict triggers a duty to ensure that there are no other, unknown conflicts. "[T]rial courts necessarily rely in large measure upon the good faith and good judgment of defense counsel. . . . Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry." Cuyler, 446 U.S. at 347, 100 S. Ct. at 1717-18. The state court's inquiry was an adequate response to the evidence of an indirect, limited conflict that was then before it.

5. Claim A-5

Petitioner argues that he was deprived of due process when the prosecutor questioned him regarding his post-charging silence. In Doyle v. Ohio, 426 U.S. 610, 617-18, 96 S. Ct. 2240, 2244-45 (1976), the Supreme Court held that it is unconstitutional for a prosecutor to impeach a defendant with evidence of post-arrest silence. Although prior inconsistent statements may constitutionally be used to impeach, silence may not.[12]

---

12. Where a prisoner waives his Miranda rights and speaks to

Petitioner takes issue with the following exchange during his cross examination:

> Q: Mr. Belmontes, from the time you talked to Deputy Holman and Deputy Cooper at the San Joaquin County Jail on March 22nd 1981, until today in this very courtroom you have never spoken to law enforcement concerning what happened on March 15, 1981?
> A: Have I spoken to officers?
> Q: About it. That's right.
> A: From the first day I got arrested?
> Q: No. From the jail statement on Sunday, when you were booked in the county jail and gave the third statement we have been calling the jail statement, until now you've never told law enforcement officers about it, anything else that happened there?
> A: No.
> [Defense counsel]: Judge, in fairness, I think the jury should be instructed once he's appointed an attorney, that conversation has to be directed through the attorney.
> [The court]: Yes. The question, ladies and gentlemen, is somewhat misdirected in the sense that Mr. Belmontes does not have to talk to anybody. As a matter of fact, he's admonished by his counsel, once lawyers have been appointed to represent him, not to talk to anybody. You should be aware of that fact. Without the presence of the lawyer.
> Q: All right. So from then until now you haven't been on the record about what happened?
> A: Not on the record. But a few times Officer Holman has taken me to court while we were in Lodi and we talked about it. But not on record.
> Q: About the details of the offense?

---

officers, he may be impeached by statements he makes that are inconsistent with later testimony. But silence in reliance on Miranda warnings cannot be used to impeach. See Doyle v. Ohio, 426 U.S. 610 (1976); Phelps v. Duckworth, 772 F.2d 1410, 1412 (7th Cir. 1985).

A: Not really details. Just told him that I didn't do it. Told him that I was serious about when I said I hit the girl one time.

(RT 1973:1-1975:5.)

Unlike Doyle, this line of questioning was not an attempt to impeach Belmontes based on post-arrest silence – he was anything but silent – but was, rather, a clarification of how many statements Belmontes had made. In contrast with Doyle, the prosecutor here did not argue that Belmontes had fabricated the story he told at trial after the date of his third conversation with police, nor could he have done so; Belmontes' trial testimony was essentially consistent with the last version of events he related to police in the San Joaquin County jail. After the above exchange, the prosecutor made no reference to Belmontes' silence as tending to discredit his story. Even assuming, however, that the jury would have understood the exchange as Belmontes now suggests, as impeachment of Belmontes' credibility, it is clear that any Doyle error was harmless. In contrast with Doyle, the trial court here sustained Belmontes' objection to the prosecutor's question, and delivered a cautionary instruction at defense counsel's request.[13/] See Doyle, 426 U.S. at 614, 96 S. Ct. at 2243 (noting prosecutor's repeated references to defendant's silence, and trial court's overruling of objections); see also Phelps, 772 F.2d at 1413 (prejudice inquiry under Doyle depends, among other factors, on the use to which the prosecution puts the post-arrest silence; the quantum of other

---

13. Petitioner argues that the instruction compounded, rather than cured, the problem, in that it emphasized petitioner's exercise of his right to remain silent. Inadvertent emphasis is a widely recognized hazard of objection, however. It is apparent from the transcript that defense counsel received precisely the corrective instruction that he demanded. Thus, the alleged Doyle violation may be waived. To the extent that petitioner may wish to argue that his counsel was ineffective in failing to make the correct objection, see U.S. v. Chavez, 193 F.3d 375, 378-79 (5th Cir. 1999), the absence of prejudice would be no less fatal to petitioner's claim under Strickland, than under Doyle.

evidence indicative of guilt; the intensity and frequency of the reference; and the availability to the trial judge of an opportunity to grant a motion for mistrial or to give curative instructions). The only information developed was that petitioner spoke "off the record" to a deputy and made statements to the deputy that were consistent with his defense. In short, any error was clearly harmless beyond a reasonable doubt. See Phelps, 772 F.2d at 1413 ("Impermissible prosecutorial comment regarding post-arrest silence does not require reversal if the court determines it is harmless beyond a reasonable doubt.").

6. Claim A-6

Petitioner argues that the trial court improperly restricted the scope of cross examination of prosecution witness Carrie Rogers, who is Domingo Vasquez's wife. Petitioner's version of the events of March 15, 1981, was that he had struck McConnell only once, and that Domingo Vasquez must have struck the later, and fatal, blows. Carrie Rogers testified that she had heard petitioner state, on the evening after the murder, that he had struck the victim multiple times.

Belmontes' counsel cross examined Rogers as to her relationship with, and motive to protect, Vasquez, but was not permitted to inquire into Rogers' understanding of how her testimony could affect Vasquez's chances of parole.[14/] The trial court expressed concern that this line of questioning might distract the jury with collateral information about Vasquez's sentence, and so permitted cross examination about Rogers' motive to protect Vasquez's good name, but not about the more specific and tangible motive to facilitate his parole.

This restriction on cross examination was reasonable, and did not violate Belmontes' rights under the confrontation clause.

---

14. At the time of Rogers' testimony, Vasquez had pled guilty to second degree murder in connection with McConnell's death and been sentenced to a term of fifteen years to life.

"[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, [or] confusion of the issues." Delaware v. Van Arsdall, 475 U.S. 673, 679, 106 S. Ct. 1431, 1435 (1986). There was no evidence that Rogers believed that her testimony could affect Vasquez's parole date. In this circumstance, the court could conclude that opening up the topic of Vasquez's conviction and parole could lead to jury confusion and would not be probative. Moreover, even were the trial judge's ruling erroneous, it was plainly harmless. The record establishes that Rogers' loyalty to Vasquez was adequately demonstrated to the jury, in a number of ways. As the California Supreme Court summarized the record:

> Here the jury learned Rogers had been with Vasquez for eight years and had married him shortly after his arrest for McConnell's murder; that they had a daughter together; that she was seeing Vasquez on a weekly basis at the time of trial; that she had been living with Vasquez and supporting him on the date of the murder; that she knew Vasquez was keeping company with other women at that time and nonetheless "didn't do anything about it"; and that she did not come forward to report her information inculpating defendant as the killer until the eve of his trial. . . .
> . . .The prosecutor conceded in his opening argument: '[C]ounsel has suggested to you [Rogers] has a very definite interest in protecting a man, Domingo Vasquez, with whom she lives. Certainly, ladies and gentlemen of the jury, somebody that would marry someone who's been involved in something like this, when he's been cheating on her and she knows about it, that's loyalty. What else can you call it? And you have to take that into account in deciding whether to believe [Rogers]. Let's face it. That really calls into question her story.'

Belmontes, 248 Cal. Rptr. at 146 & n.10. The proposed cross examination would have been cumulative and would thus not

have produced a "significantly different impression of [Rogers'] credibility" than that which was presented to the jury. Van Arsdall, 475 U.S. at 680, 106 S. Ct. at 1436.

7. Claim A-7

Belmontes argues that the trial court improperly admitted hearsay evidence that bolstered the testimony of Bobby Bolanos, identifying petitioner, rather than Vasquez, as the murderer, and that the court compounded this error with an erroneous jury instruction that precluded the jury from considering Bolanos' motive to shift blame to petitioner. The jury heard testimony, from several sources, that Bolanos had previously told a consistent story to others. Bolanos himself testified, without objection, that he had previously told his girlfriend Teresa Cobarrubio that petitioner was the killer. Cobarrubio testified to the same effect, and police officer Coffey offered double hearsay, testifying that Cobarrubio had told him that Bolanos had told her that petitioner was the killer. The trial court admitted these last two statements as prior consistent statements, to rebut Belmontes' argument that Bolanos had fabricated his story to protect Vasquez. Petitioner argues that the trial court erred, because Bolanos' motive to protect Vasquez predated the prior statements.

"A state court's evidentiary ruling is grounds for federal habeas corpus relief only if it renders the state proceeding so fundamentally unfair as to violate due process" Bueno v. Hallahan, 998 F.2d 86, 87 (9th Cir. 1993). The state Supreme Court's holding that it was not error to admit the relevant testimony is conclusive as a matter of state law. Moreover, substantial evidence supported the jury's finding that Belmontes delivered the fatal blows, and the admission of this testimony did not render the trial fundamentally unfair.

Belmontes takes exception also to the trial court's use of

California jury instruction 2.11.5, which instructs the jury not to discuss or give any consideration to why other individuals who may have been involved in the crime were not on trial along with the defendant. Petitioner argues that the jury may have understood this instruction to forbid consideration of Bolanos' plea agreement in assessing his credibility. The challenged instruction could hardly have been understood as Belmontes suggests, however, in light of the other jury instructions, which clearly required the jury to view Bolanos' testimony critically in light of his plea bargain. The court cannot say that the challenged instruction rendered the trial fundamentally unfair, as would be required to grant habeas relief on this basis. See Foster v. Ward, 182 F.3d 1177, 1193 (10th Cir. 1999) (holding that instructional error is a ground for habeas relief only if it rendered the trial so fundamentally unfair as to cause a denial of due process).

8. Claim A-9

Petitioner argues that he was deprived of due process by the retroactivity regime applied to the California Supreme Court's decision in People v. Anderson, 43 Cal.3d 1104 (1987). Anderson overturned the earlier decision in Carlos v. Superior Court, 35 Cal.3d 131 (1983), which had held that the prosecution must prove intent to kill as an element of special circumstances liability. In cases following Anderson, the Supreme Court held that a defendant tried for felony murder with special circumstances between the decisions in Carlos and Anderson was entitled to an instruction and finding on intent to kill, but that defendants tried prior to Carlos were not. Petitioner, who was tried prior to Carlos, argues that this retroactivity regime violates due process. The Ninth Circuit, however, has repeatedly held that the retroactive application of the decision in Anderson does not violate due process. See, e.g., Hamilton v. Vasquez, 17 F.3d 1149, 1164 (9th Cir. 1994); Hendricks v. Vasquez, 974 F.2d 1099, 1107 (9th Cir. 1992). Moreover, even if a finding of specific intent were required, the jury here made one. See People v. Belmontes, 248 Cal. Rptr. at 154 n.18.

9. Claim A-13

Petitioner argues that two jury instructions given by the trial court, CALJIC 6.10.5 and 6.11, are defective in that they permit a finding of guilt without proof beyond a reasonable doubt. Specifically, if the jury rejected the premeditated murder and felony murder theories, it could nonetheless have found petitioner guilty of murder on a vicarious liability theory – on the belief that Vasquez committed the murder and that petitioner was liable as his coconspirator. Because the challenged instructions permit the jury to find the existence of an uncharged conspiracy and the defendant's membership in that conspiracy by a preponderance of the evidence, Belmontes argues, he could conceivably have been adjudged guilty of murder without every element having been proved beyond a reasonable doubt.

This argument is frivolous. That the jury did not rely on a conspiracy theory in convicting Belmontes is evidence from its special findings that Belmontes was guilty of intentional and premeditated murder.[15/]

10. Claim A-14

Petitioner argues that the trial court improperly refused to give requested instructions on lesser-related offenses that encapsulated petitioner's theory of the case. There is no federal due process right to instruction on lesser-related offenses.[16/] See Hopkins v. Reeves, 524 U.S. 88, 97, 118 s. Ct. 1985, 1901

---

15. The jury found that petitioner personally and intentionally committed the killing, and that he was the actual killer, and rejected the only vicarious liability special finding that it was given – the allegation that Belmontes had intentionally aided, abetted or assisted in the killing.

16. Petitioner argues that there is a federal constitutional requirement that a court instruct the jury on a defendant's "theory of the case." (See 1995 Mem. in Supp. at 25-26.) The cases cited for this proposition, however, all pertain to instructions concerning a theory offered in defense, such as entrapment or alibi, not to instruction on lesser-related offenses.

(1998) (declining to extend rule of Beck v. Alabama, 447 U.S. 625, 100 S. Ct. 2382 (1979) from lesser-included offenses to lesser-related offenses). Although California formerly recognized a right to such an instruction, see People v. Birks, 77 Cal. Rptr. 2d 848 (1998). Even if instructions on lesser-related offenses were constitutionally required, the trial court's error in refusing them would be harmless, since, as the California Supreme Court noted, the record does not "support the possibility that the jury would have convicted defendant of the lesser-related offenses under the refused instructions." 248 Cal.Rptr. at 153.

As to the denial of petitioner's request for aiding and abetting instructions, their omission could not have prejudiced petitioner, because it is evident from the special findings that the jury found petitioner directly, and not vicariously, liable.

B. Penalty Phase

1. Claim B-1

Belmontes argues that he was deprived of due process and the effective assistance of counsel by trial counsel's failure to conduct a reasonably adequate mental state investigation, and by counsel's failure to present mental state evidence in mitigation in the penalty phase.

Belmontes' trial counsel, Mr. Schick, retained a psychiatrist, Dr. Cavanaugh, to evaluate petitioner as to issues relevant at the guilt phase, namely insanity, diminished capacity, and competency, but did not ask him to conduct any analysis of factors relevant to the penalty phase. (See Stmt. of Facts in Supp. of Mot. for Evid. Hearing Regarding Claim B-1 at 11:10-12:13.) Schick has acknowledged that his failure to seek expert opinion regarding mental state mitigation evidence was not a tactical decision, but that he "didn't really consider the use of a psychiatrist." (Id. at 12:19-13:4.) Belmontes argues that this failure on counsel's part deprived him of the effective assistance

of counsel.

To establish that counsel's failure to consider the use of a psychiatrist for the penalty phase deprived him of counsel in violation of the sixth amendment, Belmontes must satisfy the two-part test of Strickland v. Washington, 466 U.S. 668 (1984), which requires a showing both that counsel's performance was unreasonable in light of prevailing professional norms, see id. at 687-88, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 695; see also Jackson v. Calderon, 211 F.3d 1148, 1154 (9th Cir. May 8, 2000). Strickland requires significant deference to trial counsel's strategic decisions, however. "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland, 466 U.S. at 690-91, 104 S. Ct. at 2066.

The record here shows that trial counsel pursued no investigation whatsoever into Belmontes' mental state for the penalty phase. Schick acknowledged that after consulting with Dr. Cavanaugh on competency, insanity and diminished capacity, he had no further contact with Dr. Cavanaugh, or with any other psychiatrist in relation to the penalty phase. (See Schick Depo. at 665:6-23, 667:9-24.) Under Strickland, "a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." Strickland, 466 U.S. at 690-91, 104 S. Ct. 16 2066. Even with such deference, however, it is clear on this record that counsel's decision not to pursue mental state mitigation evidence for the penalty phase was not a tactical one. (See, e.g., Schick Depo. at 665:6-23 ("I didn't really consider the use of a psychiatrist."). Counsel's failure to investigate mental state evidence for presentation at the penalty phase, even where

such evidence is unhelpful at the guilt phase, is not reasonable under Ninth Circuit precedent. See Jackson, 216 F.3d at 1162-63 (citing Hendricks v. Calderon, 70 F.3d 1032, 1043 (9th Cir. 1995)).

Belmontes is deemed to have suffered prejudice as the result of Schick's deficient performance only if he shows that "there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir. 1994). Thus, in order to determine whether Schick's failure to present certain evidence in mitigation might have affected the jury's decision, "it is essential to compare the evidence that actually was presented to the jury with the evidence that might have been presented had counsel acted differently." Bonin v. Calderon, 59 F.3d 815, 833-834 (9th Cir. 1995).

For the expert psychiatric testimony that could have been presented, Belmontes relies primarily on the testimony of Dr. James Missett, a forensic psychiatrist who examined Belmontes and researched his family history.[17] Dr. Missett identified thirteen "themes" that he believed might have been pursued as mitigation in the penalty phase:

1. Alcoholism and domestic violence by Fernando Belmontes Sr. against Belmontes' mother Carole;
2. Demeaning and discriminatory treatment of Fernando Belmontes, Sr. by the Salvaggio family from the outset of marriage and throughout petitioner's youth;
3. Circumstances of objective and comparative poverty during early childhood;
4. Positive youth achievements in Little League, Cadets, paper route, absence of any indicia of conduct disorder;

---

17. Belmontes offers testimony of other psychiatric experts as to several of the themes identified by Missett, but concedes that the themes described by Missett encapsulate his theory. (See Petr.'s Mem. on Merits of Claims A-1 through A-4 and B-1 at 62.)

5. Onset of rheumatic fever at approximately age 10 and curtailment of activities; objective adversity accompanying repeated eruptions;
6. Subjective adversity, fears of premature death;
7. Depression as a consequence during teen home schooling years;
8. Anti-Hispanic racial attitudes in high school;
9. Break up of family, loss of home in 1977;
10. Teenage criminality and youth gang support;
11. Factors operative at the time of the offense, militating against premeditation - drugs, alcohol, organic brain dysfunction, Domingo Vasquez's position as instigator of the burglary;
12. Positive institutional adjustment - leader of group in YA fire camp, safety contributions to fire crew
13. Lack of future violence potential in prison - avoidance of violence at substantial personal cost.

(Petr.'s Mem on Merits of Claims A-1 through A-4 and B-1 at 64.)

Schick used nine witnesses to develop two principal themes on Belmontes' behalf in the penalty phase, the first related to Belmontes' sympathetic life history, and the second involving his potential for institutional adjustment if sentenced to prison. In the course of developing these themes, Schick introduced testimony as to most of the factual matters identified by Missett. As discussed in Part I.B.2, supra, as to family history, Belmontes' mother and maternal grandfather, and Belmontes himself testified in some detail to Belmontes' father's history of alcoholism and domestic violence to the relationship between the Salvaggios and the Belmontes family, to the family's poverty and Mrs. Belmontes' two divorces and their effects on Belmontes. In addition, they testified to some of petitioner's positive achievements in youth.[18] It is unclear that testimony on

---

18. Petitioner identifies certain positive achievements that he argues should have been presented to the jury, such as the fact that

Missett's tenth "theme" - petitioner's adolescent involvement with gang, would have been viewed by the jury as a mitigating factor rather than an aggravating factor.[19/]

As to Petitioner's potential for institutional adjustment and history of nonviolent behavior while institutionalized, Schick introduced substantial evidence of this "theme" as well. As discussed in Part I.B.2, supra, the Reverend Dale Barrett, who supervised the M-2 program, Don Miller, Barrett's assistant pastor, and the Haros, Belmontes' M-2 sponsor family, all testified that Belmontes benefitted from a structured environment and that he had participated actively and sincerely in the program. In addition, Barrett testified that Belmontes was "salvageable," and Miller testified that he expected Belmontes to be very helpful, if imprisoned, in counseling other inmates to avoid his mistakes.

Petitioner argues that, although the jury heard testimony on each of Missett's themes, expert testimony would have helped them to weigh it appropriately. But petitioner provides no reason to believe that the jury needed professional help, beyond defense counsel's argument, to understand evidence of petitioner's difficult childhood or prospects for institutional adjustment. Given that the pertinent facts were largely before the jury, the court is not persuaded that, had the jury heard the expert testimony identified by petitioner, "there is a reasonable probability that . . . the result of the proceeding would have been different." Wade v. Calderon, 29 F.3d 1312, 1323 (9th Cir.

Belmontes held a paper route, played Little League baseball, and dealt with racism at his high school. Introduction of these facts would nto have created a reasonable likelihood of a different result.

19. Missett's fifth and sixth themes pertain to the occurrence, and socially isolating effects, of Belmontes' childhood bout with rheumatic fever. While this evidence might have aroused some sympathy for Belmontes, the court does not find it reasonably likely that it would have produced a different result. The evidence of rheumatic fever does not present a substantially "different picture of [Belmontes] than any the jury was allowed to consider." Jackson, 211 F.3d at 1163.

1994).

Only Missett's eleventh "theme" merits further discussion. Where evidence of a defendant's mental state at the time of the crime tends to undermine a finding of premeditation, counsel's failure to investigate and present expert testimony regarding such evidence is particularly likely to be deemed Strickland error. See Jackson v. Calderon, 211 F.3d at 1163-64. A finding of error is particularly likely where, as here, the aggravating evidence presented to the jury is "far from overwhelming." See id. at 1164. There was evidence that petitioner had been consuming alcohol and amphetamines for four days prior to the murder, and had not slept during that time. Dr. Missett indicates that he would have testified "to a reasonable medical certainty" that under the circumstances, petitioner's ability to deliberate would have been substantially impaired. (See Petr.'s Stmt. of Facts in Suppl. of Claim B-1, docket no. 286, at 62:16-24.) Testimony of this sort, however, would have opened the door to introduction of the evidence discussed above regarding Belmontes' alleged execution-style murder of Jerry Harmon. Had petitioner argued that he would not have murdered Steacy McConnell but for his drug intoxication, evidence of Belmontes' prior premeditated murderous acts would have been admissible to rebut the inference that Belmontes' murder of McConnell was the result of unique circumstances and that he was ordinarily incapable of the deliberate taking of another life. (Cf. RT 2331:26-2335:12.) Thus, while the aggravating evidence actually presented to the jury did not make this a clear-cut case for application of the death penalty, had Schick presented the evidence now offered by petitioner, the prosecutor would most likely have been permitted to rebut the evidence with damning evidence of prior violent acts. Competent counsel would not have done anything to jeopardize the successful exclusion of the Herman execution style killing, which would have been the most powerful imaginable aggravating evidence. Thus, the court finds no reasonable probability that, but for counsel's error, the result of the proceeding would have been different.

2. Claim B-2

Petitioner argues that he was deprived of due process by the trial court's exclusion, from the penalty phase of the trial, of evidence of the sentence imposed on Domingo Vasquez. Although the Supreme Court has held that the constitution requires some proportionality between the gravity of a defendant's crime and the sentence imposed, see, e.g., Payne v. Tennessee, 501 U.S. 808, 861, 111 S. Ct. 2597, 2628 (1991) ("proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness"), it has not held that evidence of codefendants' sentences is constitutionally relevant evidence in mitigation. Belmontes provides no binding or persuasive authority for the novel proposition that a criminal defendant has a constitutional right to introduce evidence of the disposition of charges against codefendants.[20/] Accordingly, the trial court's exclusion of that evidence as potentially confusing to the jury did not violate Belmontes' due process rights.

3. Claim B-3

Belmontes argues that the trial court erred in its response to a juror's question about the jury's role in considering aggravating and mitigating factors, in violation of his constitutional right to have the jury consider all mitigating factors. See, e.g., Hitchcock v. Dugger, 481 U.S. 393 (1987).

Petitioner's claim is based on the following exchange between juror Hern and the trial court, which occurred after several hours of deliberation:

> Juror Hern: The statement about the aggravation and the mitigation of the circumstances, now, that was the listing?
> The Court: That was the listing, yes, ma'am.

---

20. Belmontes relies primarily on a Florida Supreme Court case that held that Florida's death penalty statute requires admission of such evidence. See Messer v. Florida, 330 So. 2d 137, 141-42 (1976).

Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?

The Court: That is right. It is a balancing question.

(RT 2501:27-2502:06.)

Petitioner argues that juror Hern's comments reveal her misunderstanding of the constitutional obligation to consider non-enumerated mitigating factors, and that the trial court committed reversible error by reinforcing her impression. Hern, according to petitioner, saw the jury's role as considering the statutory list of aggravating and mitigating factors and tallying which were more numerous in petitioner's case. To prevail on this claim, Belmontes need not show that the jury more likely than not misunderstood its role. Rather, petitioner must show only "that there is a reasonable likelihood" that the jury misapplied the instruction in a way that prohibited consideration of constitutionally relevant evidence. See Boyde v. California, 494 U.S. 370, 370, 110 S. Ct. 1190, 1198.

A single instruction should not be read in isolation, but must be read in the context of the instructions as a whole and the entire record. Boyde, 494 U.S. at 383-84, 110 S. Ct. at 1199-2000. The court concurs with the Supreme Court of California that "the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities." Belmontes, 45 Cal.3d at 804-05, 248 Cal. Rptr. at 161. The jury was explicitly told that it could consider any mitigating factor and that a single mitigating circumstance on its own could support a non-death verdict. Moreover, neither the court's comments nor the juror's, in this brief exchange, suggests a misunderstanding or repudiation of these instructions.

4. Claim B-4

Petitioner argues that California's death penalty statute is unconstitutional as applied, in that it fails to provide the "guided

discretion" required by Gregg v. Georgia, 428 U.S. 153 (1976). Specifically, petitioner argues that California's statute is unique among all death penalty statutes in that it fails to guide the jury's discretion as to which factors are to be considered mitigating factors and which are to be considered aggravating. Belmontes provides no authority for the proposition that the constitution requires that each factor be statutorily identified as either mitigating or aggravating. In Tuilaepa v. California, 512 U.S. 967, 114 S. Ct. 2630 (1994), the Supreme Court rejected the argument that "the § 190.3 sentencing factors are flawed because they do not instruct the sentencer how to weigh any of the facts it finds in deciding upon the ultimate sentence." Id. at 978-79, 114 S. Ct. at 2638. Belmontes argues, however, that although Tuilaepa upheld the statute against a facial challenge, it does not foreclose an "as applied" challenge based on the prosecutor's suggestion here that Belmontes' youth was an aggravating, rather than a mitigating factor. Tuilaepa, however, forecloses precisely this argument:

> petitioners claim that a single list of factors is unconstitutional because it does not guide the jury in evaluating and weighing the evidence and allows the prosecution (as well as the defense) to make wide-ranging arguments about whether the defendant deserves the death penalty. This argument, too, is foreclosed by our cases.

Tuilaepa, 512 U.S. at 979, 114 S. Ct. at 2638. Moreover, as the California Supreme Court noted in rejecting this claim before Tuilaepa was decided, Belmontes waived this argument by failure to object at trial. See Belmontes, 45 Cal.3d at 806, 248 Cal. Rptr. at 162.

5. Claim B-5

Petitioner argues that he was deprived of due process and subjected to cruel and unusual punishment by the admission of evidence of unadjudicated prior misconduct. The instances of prior misconduct introduced at Belmontes' penalty trial included

(i) a 1979 altercation in a juvenile facility; (ii) a 1981 domestic dispute with petitioner's girlfriend; (iii) a 1979 incident in which petitioner allegedly stole a stolen gun from the original thief by pointing the loaded weapon at the man; (iv) a 1979 incident where petitioner indicated that he was armed and confident in his ability to protect himself; and (v) a prior no contest plea to accessory to manslaughter. Petitioner asserts that "these matters were erroneously admitted and constituted an unreliable basis for the penalty determination under federal constitutional standards."

This argument is meritless. There is no constitutional bar to the consideration, at the penalty phase, of unadjudicated prior instances of criminal misconduct. See McDowell v. Calderon, 107 F.3d 1351, 1366 (9th Cir. 1997), vacated in part on other grounds, 130 F.3d 833 (9th Cir. 1997) (en banc), ("The introduction of [unadjudicated criminal conduct] during the penalty phase of a capital case does not necessarily violate a defendant's rights under the Eighth or Fourteenth Amendments or render a death sentence unreliable."); see also United States v. Cooper, 91 F. Supp.2d 90, 107 (D.D.C. 2000) (citing cases).

The only incident the admission of which arguably constituted error was the 1979 conversation in which Belmontes indicated that he was not worried about himself because he was armed. As this was not a threat directed at any individual, it was not a criminal act under the California death penalty statute. The court agrees with the California Supreme Court, however, that in light of the other aggravating circumstances, most notably the brutality of the crime itself, there is no likelihood that the admission of testimony regarding that incident prejudiced Belmontes. See Belmontes, 45 Cal.3d at 809, 248 Cal. Rptr. at 164.

6. Claim B-7

Petitioner argues that he was deprived of due process and subjected to cruel and unusual punishment by "the trial court's refusal to adequately respond to the jury's question about the

consequences of their failure to agree on a penalty." (1995 Mem. in Supp. at 43.) During penalty deliberations, the jury foreman sent the judge a note inquiring about the consequences of a deadlock as to penalty, and specifically, whether a majority vote could suffice to decide on life imprisonment. The court reinstructed the jury regarding the requirement of a unanimous verdict, and indicated that he could not answer the question as to what would happen if they could not agree. (See 1995 Mem. in Supp. at 43 & Exh. D.) Petitioner argues that the constitution requires that jurors be informed as to what will happen in the event of deadlock, and that the jury may have imposed the death penalty out of fear that deadlock would result in petitioner's retrial or eventual parole.

In Jones v. United States, the Supreme Court held that "the Eighth Amendment does not require that the jury be instructed as to the consequences of their failure to agree." Jones v. United States, 527 U.S. 373, 381, 119 S. Ct. 2090, 2098 (1999). Although the holding in Jones concerned the giving of such an instruction in every case as part of the standard instructions, the reasoning in Jones is equally applicable to the situation as here, where the jury makes inquiry.

7. Claim B-8

After the jury returned the death verdict, state law required the judge to consider an automatic motion for modification of the judgment. See Penal Code § 190.4(e). Petitioner argues that he was deprived of due process by "the trial court's pronounced prejudgment" of that motion. The trial court sent a letter to jurors several days after they rendered their verdict and several weeks before the hearing on the 190.4(e) motion, thanking them for their service, and promising that their death judgment "is acceptable and shall be followed." Petitioner observes that this letter is evidence that the trial court had prejudged the 190.4(e) motion, in violation of the court's statutory responsibility to

make an independent review of the evidence and render an independent opinion as to the appropriateness of the death penalty. (See 1995 Mem. in Supp. at 49-50.)

The California Supreme Court pronounced the offending remark "patently improper," but found that "defendant has not established that the trial judge ultimately failed to make the independent determination respecting the appropriateness of the penalty verdict, as he was obliged to do under section 190.4, subdivision (e)." Belmontes, 45 Cal.3d at 816, 248 Cal. Rptr. at 169.[21/] The Court's finding was informed by consideration of the remark in the context of the letter in which it was made and in light of the trial court's explanation, which it found "credible" that it "was made for therapeutic purpose more than a legal purpose." Id. The Court remarked that "the [trial] court's thorough and detailed findings entered in the record reinforce our conclusion." Id. Assuming that the alleged failure to adhere to a state law requirement would violate Belmontes' federal constitutional rights, the California Supreme Court's conclusion that the trial court did render the required impartial judgment is entitled to deference as a factual finding.

III.

Petitioner's motion for summary judgment is DENIED. Respondent's motion for summary judgment is GRANTED. There appear to be remaining claims that were not the subject of these motions – claims A-8, A-10 through A-12, B-6, and B-9. Counsel shall submit a joint status statement within 14 days advising the court of the status of these claims and proposing a future schedule for the timely resolution of all remaining issues.

---

21. In these circumstances, state law places the burden on Belmontes to rebut a presumption that an official duty such as the judge's duty to render an impartial ruling on the appropriateness of the death penalty has been satisfied. See Cal. Evid. Code § 664.

IT IS SO ORDERED.

Dated: _____.

_____

DAVID F. LEVI
United States District Judge

THE PEOPLE,	)	
Plaintiff and Respondent,	)	
	)	No. S004467, Crim. No.
v.	)	22810.
	)	Supreme Court of California.
FERNANDO BELMONTES,	)	Jun. 23, 1988.
Defendant and Appellant	)	
	)	

SUMMARY

Defendant was convicted of first degree murder and burglary in the second degree. The jury returned special findings he personally committed the killing, and the murder was intentional, willful, deliberate, premeditated, and the result of the commission or attempted commission of the burglary. A special circumstance allegation under the 1978 death penalty law was found true: that the murder was committed while defendant was engaged in the commission or attempted commission of a burglary. The jury made additional special findings that defendant was the actual killer and had acted with specific intent to kill. The jury fixed the penalty at death; the trial court denied defendant's automatic motion to modify the verdict. The victim had been found beaten unconscious on the floor of her residence. She had died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head which cracked her skull. Defendant furnished three statements to investigators shortly after his arrest. In the second statement, he admitted involvement, claiming the incident was planned as a burglary with two accomplices; he admitted hitting the victim only once, knocking her to the floor. One accomplice pled guilty to burglary, received immunity from prosecution for the murder and testified for the People. (Superior Court of San Joaquin County, No. 32183, William R. Giffen, Judge.)

The Supreme Court affirmed. As to the guilt phase of trial, it held the trial court properly admitted defendant's pretrial statements, since no improper threats or promises of leniency were made to him by police investigators. Also, the trial court properly admitted evidence of a prior consistent statement of the girlfriend of the testifying accomplice, confirming that such accomplice told her that defendant had killed the victim. It also held the trial court was within its discretion in limiting cross-examination of the girlfriend, as to the disposition of the testifying accomplice's case. It further held the People were entitled to proceed on an alternative uncharged conspiracy theory of liability. It also held the jury properly made special findings in connection with the verdict of guilt of first degree murder, and with regard to the special circumstances found to be true. It further held the special circumstance finding of premeditation and deliberation was supported by the evidence.

As to the penalty phase, the court held the jury was adequately informed of the full nature of its responsibility to consider sympathy, and defendant's general character and background evidence. It also held the jury was adequately informed of the full nature of its sentencing responsibility, even though an instruction charged that it "shall" impose death if it found that aggravating circumstances outweighed mitigating circumstances. It further held the jury did not improperly consider the age of defendant at the time of the murder or his lack of remorse as aggravating factors. Although a juror had talked to a member of the victim's family during a break in the penalty phase and an alternate juror had talked to another family member, it held the presumption of prejudice was rebutted and no prejudice actually resulted. It also held the trial court did not err in excluding evidence of the pleas and negotiated dispositions of defendant's two accomplices. It held the trial court erred in sending a letter to the jurors, after they were discharged, indicating their decision was acceptable and would be followed, since the judge had not yet heard defendant's automatic motion for modification of the jury's death verdict; however, defendant did not establish that the judge failed to make the independent determination as to the

appropriateness of the penalty verdict. (Opinion by Eagleson, J., expressing the unanimous view of the court.)

COUNSEL

Eric S. Multhaup, under appointment by the Supreme Court, Jean R. Sternberg and Kathy M. Chavez for Defendant and Appellant.

John K. Van de Kamp, Attorney General, Steve White, Chief Assistant Attorney General, Edmund D. McMurray, Robert D. Marshall, Jane N.[page 760] Kirkland, Michael T. Garcia and Jane L. Lamborn, Deputy Attorneys General, for Plaintiff and Respondent.

OPINION

EAGLESON, J.—

Defendant Fernando Belmontes was convicted of the first degree murder of Steacy McConnell (Pen. Code, § 187)[1/] and burglary in the second degree. (§§ 459-460.) The jury returned special findings that he personally committed the killing, and that the murder was intentional, wilful, deliberate, premeditated, and the result of the commission or attempted commission of the burglary. A special circumstance allegation under the 1978 death penalty law was found true: that the murder was committed while defendant was engaged in the commission or attempted commission of a burglary. (§ 190.2, subd. (a)(17)(vii).) The jury made additional special findings that defendant was the actual killer and had acted with specific intent to kill. The jury fixed the penalty at death; this appeal is automatic. (Cal. Const., art. VI, § 11; § 1239, subd. (b).)

For the reasons set forth hereafter, we affirm the judgment in its entirety.

---

1. All statutory references are to the Penal Code unless otherwise indicated.

I. GUILT PHASE

A. FACTS

Prosecution Case

On Sunday, March 15, 1981, the parents of 19-year-old Steacy McConnell found her beaten unconscious on the floor of her residence in Victor, several feet from the unlocked front door. She had telephoned them that same morning to advise that several people, including Domingo Vasquez, had been threatening her.

McConnell died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head which cracked her skull. The pathologist testified there would have been sounds "like a cracked pot" associated with the blows which fractured the skull, and blood would have splattered in a manner consistent with the blood patterns found on the door jambs next to where she was found. A single contusion on McConnell's right temple was caused by blunt trauma of lesser force and did not lacerate the skin. It alone would not have caused death and — if it had been the first blow — would not likely have caused unconsciousness. Numerous defensive bruises and contusions on her arms, hands, legs and feet evidenced a struggle. All wounds were consistent with having been made by the metal dumbbell bar in evidence at trial. McConnell's stereo components were missing. The lock on the rear bedroom door was broken in. The master bedroom was ransacked; traces of blood were found splattered on the walls, door jambs and a chest of drawers in that room.

Defendant was spending the weekend with Bobby Bolanos in Lodi.[2/] Both knew Domingo Vasquez, who was acquainted with

---

2. On the date of the crime, defendant was on parole from the California Youth Authority and living in a halfway house in Stockton. The jury was not told of this fact at the guilt phase.

McConnell. During the week preceding the murder, Vasquez, Bolanos and others had "partied" at McConnell's house. Vasquez "ripped off" a quantity of amphetamine pills from her; the party ended with McConnell throwing Vasquez and his friends out of her house two days prior to the murder. The group subsequently discussed their general dislike of McConnell.

Bolanos, who pled guilty to burglary and received immunity from prosecution for the murder, testified for the People. On Sunday morning, he and defendant drove to Vasquez's residence in Bolanos's vintage black Chevy. Vasquez, who was talking on the telephone with McConnell when they arrived, shortly hung up and informed them that McConnell's parents were picking her up and she would not be home that day. Defendant was short of funds, having unsuccessfully tried to pawn a ring the previous week. Bolanos, a seasonal farmworker, was out of work. Vasquez was unemployed. The three men agreed to burglarize McConnell's residence, steal her stereo and "clean house." Defendant was wearing a baseball cap with its bill flipped up, Vasquez wore a stocking cap or beanie, Bolanos wore a checkered Pendleton shirt-jacket. Vasquez's girlfriend, Carrie Lynn Rogers, was present; she testified that as the men departed defendant picked up a steel dumbbell bar which he carried out with him.

Bolanos was the "wheel man" and never entered McConnell's residence; a role confirmed by defendant. En route to Victor, defendant suggested that he alone would approach the house on foot, using the metal bar if needed to force entry. Bolanos pulled over a short distance from the house; defendant left his wristwatch behind, concealed the bar under his jacket and walked to the residence. In accord with the plan, Bolanos and Vasquez waited several minutes, then drove up and backed into McConnell's driveway. Vasquez could not find the key to the trunk. As Bolanos got out of the vehicle to assist Vasquez, he heard repeated knocking or banging noises coming from within the house. They thought defendant was having trouble with the stereo. Vasquez entered to assist him. Bolanos remained in the

car, still hearing the rhythmic thumping sounds as Vasquez walked up to the front door.

Shortly, defendant and Vasquez emerged from the house carrying stereo components. Defendant alone was covered with blood sprinkled on his face, pants and shoes. Vasquez "looked like he had seen a ghost." Defendant informed Bolanos he had to "take out a witness" because she was home. He explained that McConnell heard Vasquez and Bolanos drive up, and that he hit her with the bar when she looked away from him, and continued to hit her approximately 15 more times.

Lucy Flores, McConnell's neighbor, observed a black Chevy with distinctive, wide taillights back into McConnell's driveway on the morning of her murder. A dark-complected man wearing a stocking cap got out of the passenger side and tried to unlock the trunk. He appeared to have difficulty with the lock, whereupon the driver, a male of Mexican or Italian ancestry, wearing a brown checkered shirt-jacket, got out of the car and unlocked the trunk. The driver got back in; the passenger walked towards the front of McConnell's house and met a third man. Flores did not see where the third man had come from. A short while later, she observed the two men hurriedly exiting from the back door of McConnell's house. The man in the stocking cap was carrying stereo speakers, the third man followed close behind carrying a stereo amplifier. They put the items in the trunk, got in the car and drove off.

Bolanos testified that en route to the nearby city of Galt to fence the stereo, defendant, who was wearing gloves, wiped blood off of the metal bar and his shoes. Defendant threw the bar out of the car window as they crossed a bridge over the Mokelumne river (Bolanos later led police to the location on the river bank from which the bar was recovered). The group went to the home of Manuel Vasquez, Domingo's brother, where defendant changed into a pair of clean pants. One Raul Barron was contacted; he met the three men at the home of Irma Vasquez, Domingo's sister, and purchased McConnell's stereo

components for $100. The stereo components were recovered and introduced into evidence; Barron testified he paid $100 for them to the man wearing the baseball cap who did most of the talking.

Later that afternoon Bolanos gave his girlfriend, Teresa Cobarrubio, $15 from his share of the proceeds from the sale of the stereo. Acting scared, he informed her that he, defendant and Vasquez had burglarized McConnell's residence. The following day Bolanos and Cobarrubio read a newspaper account of McConnell's murder. Cobarrubio testified that at that point Bolanos related further details of the crime, informing her that he had remained in his car outside of McConnell's house, and that defendant had exited from the house with blood all over his clothes, stating he had to "take a witness out."

On Monday, March 16, Vasquez called Bolanos in a panic to advise he had been questioned by police and did not want to "take the rap" for defendant. Bolanos and defendant went to Vasquez's house where the three sat in the living room discussing the murder. Carrie Lynn Rogers, Vasquez's girlfriend (who subsequently married him in jail — and who was a distant cousin to Bolanos) testified that from the kitchen she overheard the men discussing their sortie to McConnell's house, and heard defendant describe how he had first entered alone and hit McConnell several times with the bar, after which Vasquez had joined him in the house.

After the meeting, defendant telephoned his girlfriend, Barbara Murillo. Murillo testified that during the conversation defendant informed her he was "in trouble," relating that he had gotten into an argument with McConnell at her house, become angered and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep."

Belmontes fled to Southern California where he was arrested by Ontario police six days after the murder. Blood found on the tongue of one of his shoes was tested and found to be "type O"

— McConnell's blood type.

Defendant furnished three tape-recorded statements to investigators shortly after his arrest. In the first statement he denied any complicity in the crime, but inquired whether Bolanos or Vasquez had been taken into custody. In his second statement he admitted involvement; claiming the incident was planned as a "stupid little burglary." He had approached McConnell's house alone on foot; when she answered the door he entered and they just talked. He was not carrying the metal bar. When Bolanos drove up, defendant thought they would all talk a bit and leave. Instead, Vasquez came to the door and hit McConnell "two or three" times. They grabbed the stereo and ran.

In his third statement, defendant admitted he was armed with the dumbbell bar when he entered McConnell's house. After speaking with her for a few minutes, Vasquez arrived and pushed the front door open. McConnell immediately recognized Vasquez, who ordered defendant to "hit her." Defendant complied, hitting McConnell once in the head with the bar, knocking her to the floor. He proceeded to break down the rear bedroom door, search the closet, and remove the stereo components from the front of the house to Bolanos's car. He was not paying attention to Vasquez's actions during this period, and did not observe how the victim came to have suffered 15 to 20 fatal blows to her head.

Defense Case

The prosecution proceeded on actual malice-deliberation, vicarious liability (conspiracy) and felony-murder theories. Belmontes's defense was that he abandoned all intent to go through with the burglary once he knocked on the door and discovered McConnell at home. He only entered the house to "play it out." Although he struck McConnell the one blow with the bar, it was only at Vasquez's direction; he did not intend to kill her. Vasquez must have dealt the additional fatal blows to

McConnell while defendant was breaking into and searching the back rooms of the house.

Defendant testified in his own behalf. On Sunday morning, March 15, he and Bolanos went to Vasquez's house. Defendant had $7 remaining from his last paycheck and would not be paid again until April. Vasquez suggested they steal McConnell's stereo because she was a "snitch." Defendant had been to McConnell's house twice in the previous month. She was not a friend, however, and it meant nothing to him to "rip her off." He testified: "It was just something that came up. Everybody agreed on it, it happened. You can't tell what's going to happen from one day to the next."

They drove to Victor and parked a half block away from McConnell's house. The plan was for defendant to go to the door first, since McConnell would not let Vasquez or Bolanos inside but was unaware defendant knew them. Defendant, however, did not anticipate that McConnell would be home. Vasquez gave him the dumbbell bar to use to break a window. Defendant concealed it up his sleeve. Vasquez and Bolanos stayed in the car; defendant walked to McConnell's front door, knocked, and she answered. He told her he was hitchhiking and was stopping by because it was raining. McConnell invited him in. She noticed a bulge in his sleeve and asked what it was. Defendant showed her the bar, explaining he had it because he was hitchhiking; thereafter displaying it openly. He used McConnell's bathroom and then stood by the table and talked while she ironed clothes. She related that she was having problems with some people and asked him if he knew Domingo Vasquez. Defendant said he had met Domingo before.

Five minutes after defendant entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Defendant followed behind her and was placing the bar back up his sleeve when Vasquez rapped loudly on the door. According to defendant, the sequence of events was such that after pulling up Vasquez must have come directly to

the front door; he would not have had time to go to the trunk of Bolanos's car.

Vasquez pushed the door open, saw McConnell and ordered defendant to "hit her." Defendant followed Vasquez's directive and hit McConnell in the side of the head with the bar, using as much force as he could with a backhanded sweeping motion. She fell to the floor. Defendant dropped the bar, ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room, all within a matter of several seconds. He did not enter or ransack the master bedroom, testifying it must have been Vasquez. Upon returning to the front of the house, defendant observed Vasquez standing in the same spot holding the metal bar. He had not seen Vasquez hit McConnell nor heard any blows landing, because he was not paying attention. He could not explain the presence of defensive bruises and contusions on McConnell's hands and feet.

Defendant testified he was "mad" and "disgusted" because Vasquez was just "standing there like a fool" not doing anything while he was running around the house "looking for something to take." Defendant told Vasquez to grab something; Vasquez picked up a speaker. Defendant ripped out the stereo wires and antenna, put the second speaker on top of the stereo unit, and told Vasquez to run. Vasquez ran out the back door; defendant followed close behind.

They loaded the stereo components into the trunk. Vasquez got in the back seat, defendant rode "shotgun side," and Bolanos drove. En route to Galt, Vasquez handed defendant the steel bar which had flesh and hair residue on it, stating he had to take out a witness. Defendant, still wearing his gloves, wiped blood off the bar and set it down on the floorboard. He was uncertain whether there was blood on his pants when he left McConnell's house; some might have come off the bar when he placed it on the floorboard. He denied having wiped any blood off of his shoes. Bolanos and Vasquez told him to throw the bar out his window into the river; he complied.

The three drove to Vasquez's brother Manuel's house. Defendant changed into a pair of Manuel's pants. Manuel contacted Raul Barron, whom they met at Vasquez's sister Irma's house. Defendant backed the car into her garage and plugged in the stereo; Barron bought it for $100. Bolanos, Vasquez and defendant drove to Lodi, divided the money, bought some beer, then drove to the home of an acquaintance to purchase narcotics.

Defendant's girlfriend, Barbara Murillo, was questioned as a hostile witness by the defense. She and defendant were living together in Lodi shortly before the murder; at that time she had a two-year-old daughter by him and was pregnant with his second child. Six months after the murder she ran into Cobarrubio at the Grape Festival. Murillo believed defendant was the murderer. But when she asked Cobarrubio for further details about the crime, the latter claimed defendant had been "set up" because he had no backup in the area, while Vasquez had a network of local friends.

Cobarrubio was questioned on the matter. She recalled running into Murillo at the Grape Festival and being asked if defendant had committed the murder. She responded affirmatively. Murillo then asked Cobarrubio if she thought defendant "might have been set up." She replied: "Well, he might have." Cobarrubio testified further that in fact she had no information from any source that defendant had been set up. She had answered Murillo's inquiry to that effect because she knew defendant was protesting his innocence and felt sorry for Murillo, who seemed to still care about defendant.

B. GUILT PHASE ISSUES

Defendant raises a number of contentions relating to the issue of guilt. None, as we shall show, warrants reversal.

1. *Validity of the Arrest Warrant*

Defendant asserts the invalidity of his arrest warrant on two

grounds: (1) that it was facially invalid because it was based solely on the uncorroborated accusation of accomplice Robert Bolanos (see *People* v. *Campa* (1984) 36 Cal.3d 870 [206 Cal.Rptr. 114, 686 P.2d 634]); and (2) that material facts tending to negate the reliability of Bolanos's information were omitted from the affidavit in support of the warrant. (See *People* v. *Kurland* (1980) 28 Cal.3d 376 [168 Cal.Rptr. 667, 618 P.2d 213].) He argues that his bloodstained shoes and extrajudicial statements should have been suppressed as the fruits of his illegal arrest.

The arrest warrant was not challenged on these grounds in the trial court. "[Q]uestions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal [citations]." (*People v. Rogers* (1978) 21 Cal.3d 542, 548 [146 Cal.Rptr. 732, 579 P.2d 1048]; *People v. Easley* (1983) 34 Cal.3d 858, 869 [196 Cal.Rptr. 309, 671 P.2d 813]; see Evid. Code, § 353.) The contrary rule would deprive the People of the opportunity to make their record on the matter and cure the defect at trial. (*People* v. *Rogers, supra*, 21 Cal.3d at p. 548, and cases cited.) "Because of [his] failure to make a timely and specific objection on this ground ... the point must be deemed waived." (*People* v. *Green* (1980) 27 Cal.3d 1, 22 [164 Cal.Rptr. 1, 609 P.2d 468].)

While acknowledging trial counsel's failure to challenge the arrest warrant, defendant urges us to reach the merits of his claim on the ground that failure to do so constituted ineffective assistance of counsel. In order to establish such inadequacy, he must demonstrate that counsel failed to perform with reasonable competence, and that it is reasonably probable a determination more favorable to the defendant would have resulted in the absence of counsel's failings. (*People* v. *Fosselman* (1983) 33 Cal.3d 572, 583-584 [189 Cal.Rptr. 855, 659 P.2d 1144]; *People* v. *Pope* (1979) 23 Cal.3d 412, 425 [152 Cal.Rptr. 732, 590 P.2d 859, 2 A.L.R.4th 1].) Defendant has failed to meet his burden. Our review is limited to consideration of the facts established by

the appellate record.

a. Reliability of Accomplice-informant Bolanos's Hearsay Statements

In *People* v. *Campa, supra*, 36 Cal.3d 870, we affirmed the trial court's determination that defendant's arrest was illegal because the affidavit in support of his arrest warrant failed to establish probable cause. There, a van had pulled alongside a car and, after a brief exchange of words between a passenger in the van and the driver of the car, the van passenger fired several shots into the car, wounding the driver and killing the passenger. Subsequent investigation led to one Richard Martinez, whose parents owned the van. Placed under arrest for murder and interrogated, Martinez admitted his participation in the incident, but stated Campa had done the actual shooting. A warrant was procured for Campa's arrest based upon Martinez's statement.

Since Campa's crime occurred prior to the adoption of Proposition 8, we applied principles of California constitutional law theretofore unimpacted by that initiative measure. (*People* v. *Smith* (1983) 34 Cal.3d 251, 262 [193 Cal.Rptr. 692, 667 P.2d 149].) We relied on *People* v. *Hamilton* (1969) 71 Cal.2d 176 [77 Cal.Rptr. 785, 454 P.2d 681], wherein we stated that "for an affidavit based on an informant's hearsay statement to be legally sufficient to support the issuance of a ... warrant, two requirements must be met: (1) the affidavit must allege the informant's statement in language that is factual rather than conclusionary and must establish that the informant spoke with personal knowledge of the matters contained in such statement; and (2) the affidavit must contain some underlying factual information from which the magistrate issuing the warrant can reasonably conclude that the informant was credible or his information reliable."[3] (*Id.*, at pp. 179-180.)

---

3. In *Campa, supra*, 36 Cal.3d 870, we recognized that *Hamilton* and its progeny relied upon the "essentially identical two-part test" laid down by the United States Supreme Court in *Aguilar v. Texas* (1964) 378 U.S.

In *Campa* we concluded that accomplice Martinez's affidavit contained no factual information relative to his credibility — the second *Aguilar* prong, *supra*, 378 U.S. 108 — other than that he was himself in custody on a murder charge and had admitted his participation in the crime. We explained further: "This is not to say that in all such cases the statement of a coparticipant implicating a suspect in criminal activity should be disregarded in finding probable cause for issuance of a warrant. Admissions may be made under circumstances in which their credibility is enhanced. Other 'indicia of reliability,' such as ... corroborative evidence obtained independently may buttress the credibility of an arrestee's statement." (*Campa, supra*, 36 Cal.3d at pp. 883-884; see *People* v. *Scoma* (1969) 71 Cal.2d 332, 337-338 [78 Cal.Rptr. 491, 455 P.2d 419], and cases cited.)

Although the magistrate and parties below did not have the benefit of a reading of Campa, reasonably competent counsel at that time would have been familiar with the principles reiterated in this court's earlier cases which applied the *Aguilar-Spinelli* test. Here, the circumstances of the crime and evidence found at the crime scene — as summarized in the affidavit — corroborated Bolanos's statement. Bolanos asserted the murder was committed in the course of a burglary during which McConnell's stereo was stolen and later fenced — the affiant, Detective Holman, declared that the victim's house had been found ransacked. Bolanos stated defendant had beaten the victim with an iron bar causing

---

108, 114 [12 L.Ed.2d 723, 728-729, 84 S.Ct. 1509], and *Spinelli v. United States* (1969) 393 U.S. 410, 413 [21 L.Ed.2d 637, 641-642, 89 S.Ct. 584]. However, we deemed the *Aguilar* test "a convenient shorthand articulation of previously established principles of California law in the area of hearsay affidavits." (*Campa, supra*, 36 Cal.3d at p. 880.) In *Illinois v. Gates* (1983) 462 U.S. 213 [76 L.Ed.2d 527, 103 S.Ct. 2317], the Supreme Court abandoned the *Aguilar-Spinelli* "two-pronged test" and substituted a "totality-of-the-circumstances" analysis. Since McConnell was murdered prior to the effective date of Proposition 8 (June 9, 1982), we have no occasion to consider the effect, if any, of the United States Supreme Court's decision in *Illinois v. Gates* upon the facts of this case. (*Campa, supra*, 36 Cal.3d at p. 885, fn. 5.)

defendant to become splattered with blood — such was consistent with the nature of the victim's injury ("blunt trauma to the head") noted in the autopsy results incorporated into the affidavit.

Moreover, although defendant stresses that Bolanos had a self-serving interest in "pegging" him as the actual killer, all three participants in the burglary (defendant, Vasquez and Bolanos) shared felony-murder liability for McConnell's murder. In his statement, Bolanos confessed to his own role in the planning, participation and aftermath of the burglary; nothing therein suggested he had withdrawn from the criminal conspiracy at any time. Nor does defendant attempt to challenge the sufficiency of the affidavit to support his arrest under the warrant for *burglary*.

Mindful of the preference to be accorded warrants in doubtful or marginal cases (see *Campa, supra*, 36 Cal.3d at p. 884, and cases cited), trial counsel could reasonably have concluded that the affidavit contained sufficient corroboration of Bolanos's hearsay statement; that the arrest warrant thus issued on probable cause; and that a de novo motion to quash the warrant would have proved futile.[4/] Defendant has not met his burden of showing that failure to challenge the warrant on this ground amounted to ineffective assistance of counsel.

b. Omission of Material Facts From the Affidavit

Defendant argues there were four material omissions from the affidavit in support of the arrest warrant: (1) Deputy Holman had never heard the name Fernando Belmontes prior to Bolanos's

---

4. We note that counsel did move to suppress the "fruits of defendant's arrest" on other grounds. Counsel sought exclusion of defendant's extrajudicial statements as involuntary; moved to suppress defendant's bloodstained shoes on the ground that their seizure was beyond the lawful scope of a search incident to arrest pursuant to warrant; and vicariously sought to suppress the fruits of Bolanos's statement to police on grounds that he was unlawfully detained, searched and arrested.

statement, although Vasquez was on the police list of people recently in contact with the victim; (2) the black Chevy described by Lucy Flores, McConnell's neighbor, was traced to Bolanos and impounded before he furnished his statement; (3) Bolanos had initially reacted to police questioning by lying and denying any knowledge of the crime; and (4) his eventual inculpatory statement was prompted not by good citizenship, remorse or a guilty conscience, but rather by the police confronting him with his girlfriend's incriminating statements.

Recognizing that the record is incomplete because this claim was not litigated in the trial court to determine whether the omissions were intentional, reckless or negligent, defendant nevertheless urges us to reach the merits of his claim because the omissions were negligent "as a matter of law." For reasons already noted, the point has been waived on appeal. (*People* v. *Green, supra*, 27 Cal.3d at p. 22.)

Nor was trial counsel incompetent in failing to attack the arrest warrant on this ground. Prior to the effective date of Proposition 8, Kurland applied. (*People* v. *Kurland, supra*, 28 Cal.3d 376; see *In re Lance W.* (1985) 37 Cal.3d 873, 896 [210 Cal.Rptr. 631, 694 P.2d 744]; compare *Franks* v. *Delaware* (1978) 438 U.S. 154, 155-156 [57 L.Ed.2d 667, 672, 98 S.Ct. 674].) Although Kurland speaks to search warrants, the test is equally applicable to omissions from arrest warrants. (*People* v. *Anderson* (1983) 149 Cal.App.3d 1161, 1164 [197 Cal.Rptr. 413]; see *People* v. *Sesslin* (1968) 68 Cal.2d 418, 424 [67 Cal.Rptr. 409, 439 P.2d 321].)

Counsel could competently have concluded that the omitted facts were either immaterial, or their omission reasonable. In either situation no sanction is imposed and, assuming the affidavit otherwise supports probable cause, the warrant usually stands. (*Kurland, supra*, 28 Cal.3d at pp. 387-388.) Omissions are "material" only if they rendered the affidavit substantially misleading, i.e., if there was "a substantial possibility [the omitted facts] would have altered a reasonable magistrate's

probable cause determination." (*Id.*, at p. 385.)

It is difficult to see how the officer-declarant's unfamiliarity with defendant would have borne upon *Bolanos's* reliability — the precise matter at hand. Nor did omission of the fact that Bolanos's Chevy was impounded shortly before he furnished his statement diminish its reliability. If anything, inclusion of the fact that his vehicle had been identified would have corroborated his claim that he drove the participants to the crime scene. Nor would Bolanos's truthful statement — furnished after he learned his girlfriend had incriminated him — necessarily have been more reliable had it been shown to be motivated by "good citizenship" or "remorse." Inclusion in the affidavit of the circumstance that Bolanos's statement conformed to his girlfriend's report to police of what he had told her about the crimes would also have further enhanced its reliability. Lastly, although Bolanos may have initially denied knowledge of or involvement in the crime, it was his own incriminating admissions in his statement, together with other corroborative facts in the affidavit, upon which the magistrate could justifiably rely in assessing the reliability of Bolanos's statement.

Defendant has failed to show a "substantial possibility" that inclusion of these facts in the affidavit would have altered the magistrate's determination of probable cause. He has thus not met his burden of demonstrating that failure to attack the warrant on this ground constituted ineffective assistance of counsel.

2. *Admission of Defendant's Extrajudicial Statements*

Defendant contends that his pretrial statements, in which he made inculpatory admissions of involvement in McConnell's murder, should have been suppressed as the involuntary products of threats and/or promises of leniency by the homicide investigators. Specifically, he condemns the officers' use of the "technique of invoking the threat of the death penalty and then offering the hope of leniency through the means of confession."

Six days after the murder, San Joaquin Detectives Elbert Holman and Lyle Cooper, armed with the arrest warrant, traveled

to San Bernardino County and took defendant into custody at his mother's home in Ontario. He was taken to the Ontario Police Department for questioning and advised of his *Miranda* rights (*Miranda* v. *Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 649,86 S.Ct. 1602, 10 A.L.R.3d 974]). Defendant acknowledged he understood his rights, waived them, and indicated his desire to speak with the officers. The waiver of rights and ensuing statement were tape-recorded.

In his first statement, defendant admitted knowing Bolanos, Vasquez and McConnell. He admitted having been to McConnell's house twice in January and February of that year. He had spent the previous weekend with Bolanos in Lodi. At first he claimed he had not been to Vasquez's house on the Sunday of the murder; thereafter he admitted having gone there. He claimed he had come to Ontario to be with his girlfriend. He denied having discussed burglarizing McConnell's residence while at Vasquez's house; being with Bolanos or Vasquez in Galt on Sunday morning; parking around the corner and walking to McConnell's house to break in; hitting her with the dumbbell bar as Bolanos and Vasquez were heard driving up; taking the stereo; attempting to throw the bar into the Mokelumne river; or selling the stereo in Lodi. When given an opportunity to ask questions, defendant wanted to know if Bolanos and Vasquez were already in custody, and was told they were in jail in Stockton charged with the murder. The interview was concluded and the tape recorder turned off.

Deputy Holman testified that after turning off the machine defendant was told they would be going back to Stockton. Holman stated to defendant: "Thanks for lying to me." When defendant expressed surprise, Holman added: "Why do you think we came down here and got you by name if we didn't know the story prior to coming down here?" Defendant asked for a minute to think about it, then indicated he wanted to "tell [Holman] what

had happened." Holman advised defendant he would not continue taking the statement unless the tape recorder was turned back on, and this was done. Less than three minutes had elapsed since the conclusion of the first statement. Holman testified he did not recall either he or Deputy Cooper ever mentioning to defendant, in the two or three minutes that the tape recorder was turned off, that "this was a death penalty case." He recalled Deputy Cooper telling defendant that "the whole case was lying on him"; which Holman felt accurately characterized the status of the investigation up to that point. Holman never told defendant they had him "dead to rights"; it was defendant who had first used that expression.

Deputy Cooper testified that during the break between statements, Holman told defendant he would be going back to Stockton to stand trial, that it was "a homicide case," that "he would have a long time to think about it," "and he may have even been told it was a — in our estimation a death penalty case. I don't recall if we told him that. [¶] I believe he was told there was no bail, again. That's about the extent of it. It was a very short conversation." Cooper testified that if the term "death penalty" was mentioned, it was not intended to scare defendant. Finally, his comment to defendant that "you want to clear it up so that its not all laying [*sic*] on you" was merely a reference in context to defendant's own earlier exclamation to that effect.

The transcript of the second tape-recorded statement supports the officers' testimony. Defendant indicates therein that Holman had not coerced him into making a second statement by use of the term "dead to rights"; that he had not been threatened or promised anything to make a second statement; that less than three minutes had elapsed since the tape recorder had been turned off; and that he had volunteered during the break that he had not been truthful in the first statement and now desired to level with the officers.

In his second statement — which defendant testified he

furnished "because only three people knew what had happened, yet the deputies seemed to know everything" — defendant claimed the incident was planned as a "stupid little burglary." He approached McConnell's house alone on foot; when he knocked and found her home he entered and they talked. He was not carrying the metal bar. When Bolanos drove up, he thought they would all talk some more and leave. Instead, Vasquez came to the door and hit McConnell "two or three" times. They grabbed the stereo and ran. The rear bedroom was never ransacked. Bolanos and Vasquez told him to throw the bar out the car window. He got some blood on his pants but thought Vasquez did too.

Defendant's third tape-recorded statement was taken on the following day in the San Joaquin County jail. He was again *Mirandized*, waived his rights, and does not here challenge the voluntariness of that statement on separate grounds. He admitted therein to being armed with the dumbbell bar upon entering McConnell's house. After speaking with her for a few minutes, Vasquez arrived and pushed the front door open, McConnell immediately recognized him, Vasquez ordered defendant to "hit her," and defendant complied. He claimed he hit McConnell only once in the head with the bar, knocking her to the floor. He proceeded to break down the bedroom door, search the closet, then remove the stereo components from the front of the house to Bolanos's waiting Chevy. Defendant stated he did not pay attention to Vasquez's actions during this period, nor did he directly observe how McConnell came to have suffered the 15 to 20 fatal blows to her head.

The burden is on the prosecution to prove the voluntariness of a confession beyond a reasonable doubt. (*People* v. *Murtishaw* (1981) 29 Cal.3d 733, 753 [175 Cal.Rptr. 738, 631 P.2d 446]; *People* v. *Jimenez* (1978) 21 Cal.3d 595, 608 [147 Cal Rptr. 172, 580 P.2d 672].) That requirement applies equally to a defendant's incriminating admissions. (*Murtishaw, supra*, 29 Cal.3d at p. 753.)

It is well settled that "mere advice or exhortation by the police that it would be better for the accused to tell the truth when unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." (*Jimenez, supra*, 21 Cal.3d at p. 611.) As we stated in *People* v. *Hill* (1967) 66 Cal.2d 536 [58 Cal.Rptr. 340, 426 P.2d 908], the distinction between permissible and impermissible police conduct "does not depend upon the bare language of inducement but rather upon the nature of the benefit to be derived by the defendant if he speaks the truth as represented by the police." (*Id.*, at p. 549.) In terms of assessing inducements assertedly offered to a suspect, "'[w]hen the benefit pointed out by the police ... is merely that which flows naturally from a truthful and honest course of conduct,' the subsequent statement will not be considered involuntarily made [citation]." (*Jimenez, supra*, 21 Cal.3d at pp. 611-612.)

Our role as a reviewing court is "'"to examine the uncontradicted facts to determine independently whether the trial court's conclusion of voluntariness was properly found ...." [Citations.]'" (*People* v. *McClary* (1977) 20 Cal.3d 218, 227 [142 Cal.Rptr. 163, 571 P.2d 620].) If there is "conflicting testimony, the court must 'accept that version of events which is most favorable to the People, to the extent that it is supported by the record.' [Citation.]" (*People* v. *Hogan* (1982) 31 Cal.3d 815, 835 [183 Cal.Rptr. 817, 647 P.2d 93].)

Our independent review convinces us that no improper threats or promise of leniency were made to defendant. Deputy Holman testified that he did not, as defendant contends, "threaten him with the death penalty." Deputy Cooper's best recollection was that the term "death penalty" *may* have been mentioned at some point, but that if it was, it was not done so with intent to scare or coerce defendant into confessing. To the extent their testimony conflicted on whether the "death penalty" was ever mentioned, we must accept that version most favorable to the People. (*People* v. *Hogan, supra*, 31 Cal.3d at p. 835.)

Moreover, defendant's own responses at the beginning of his

second tape-recorded statement support the officers' testimony that he was not "threatened" with the death penalty, nor were any promises of benefit or leniency offered as inducement for his statements. Belmontes acknowledged he lied in all three of his statements to police. He testified his intent during the first statement was to deny everything: "I was holding my mug." His intention in his second statement was to tell enough of the truth so that he would be believed, but no more than necessary. Defendant's own behavior and testimony virtually precludes a conclusion that his free will was overborne by the substance or manner of the interrogation. (See *People* v. *Johns* (1983) 145 Cal.App.3d 281, 292-293 [193 Cal.Rptr. 182].)

Nor does the record support defendant's further assertion that the officers unduly coerced his statements by falsely suggesting that Vasquez and Bolanos were claiming he was the lone murderer because he was not a "home boy." At the time of defendant's questioning, Bolanos and Vasquez were in custody for the murder, and Bolanos had related that defendant went into the house first and thereafter came out with blood on him. Based upon the information they had at that point, it was reasonable for the officers to suspect defendant as the actual killer. Defendant acknowledged that it was the factual detail revealed in the officers' questions which led him to conclude that Vasquez and Bolanos had "snitched him off."

Applying the applicable standards to the facts, we conclude that the trial court properly ruled the statements admissible.

3. *Defense Counsel's Potential Conflict of Interest*

One week after the filing of the information and prior to severance, the public defender, representing codefendant Vasquez, filed a motion to recuse defendant's trial counsel, John Schick, on grounds of an alleged conflict of interest stemming from Schick's "prior representation" of Vasquez. Schick was a named partner in the law firm which prior to 1980 had been

under contract as the conflict public defender for San Joaquin County. Two years earlier, another attorney in Schick's law firm had represented Vasquez on another murder charge. That case never went to trial; the charge against Vasquez was ultimately dismissed.

In opposing his recusal, Schick filed a declaration in which he stated (1) that he was not in possession of any information relating to this case obtained through any confidential communication with Vasquez; (2) that he had made no personal appearances on behalf of Vasquez; and (3) that the office file on Vasquez's 1979 case had been destroyed over eight months earlier. At the hearing on the motion, Schick further represented that the attorney who had represented Vasquez in 1979 was no longer employed in his firm and was in private practice in Manteca. Vasquez's counsel conceded that "[c]ertainly if there were to be a severance granted, then that would go a long way towards clearing up those [potential conflict of interest] kinds of problems. But at this point as the District Attorney indicated, that is not necessarily the case. So I feel the problems are still there."[5/]

The court denied the motion to recuse Schick, concluding that under the circumstances there was no conflict of interest nor the potential for one to arise. Defendant was present and heard counsel's representations and arguments at the hearing. At its conclusion, defendant was asked: "Do you wish and is that still your desire to have [Schick] represent you?" Defendant responded, "Yes."[6/]

---

5. Defendant's and Vasquez's cases were thereafter severed on August 31, 1981.

6. In a related matter, the court granted Vasquez's motion to recuse an investigator whom Schick had hired to work on Belmontes's case, because the investigator was still employed in the public defender's office on a part-time basis at the time Schick retained his services. In so ruling, the court stated it "was satisfied without any question ... [the investigator] did not have any information or was not privy to any that would have been of conflict in any way in this particular case." The investigator was nevertheless recused "[s]o there wouldn't be any thought he might have information that

Defendant argues that reversal is required due to a conflict or potential conflict of interest arising from Schick's law firm's prior representation of Vasquez.

"It has long been established that 'the "assistance of counsel" guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.' (*Glasser v. United States* (1942) 315 U.S. 60, 70 [86 L.Ed. 680, 699, 62 S.Ct. 457]; accord *People* v. *Chacon* (1968) 69 Cal.2d 765, 774 [73 Cal.Rptr. 10, 447 P.2d 106, 34 A.L.R.3d 454].)" (*Leversen* v. *Superior Court* (1983) 34 Cal.3d 530, 536-537 [194 Cal.Rptr. 448, 668 P.2d 755].) Although the classic conflict situation involves joint representation of codefendants in the same action, "[t]he same principles apply when counsel represents clients whose interests may be adverse even when they are not codefendants in the same trial. [Citations.]" (*People* v. *Mroczko* (1983) 35 Cal.3d 86, 105 [197 Cal.Rptr. 52, 672 P.2d 835].)

"When a trial court undertakes to appoint counsel for indigent codefendants (see *People* v. *Chacon* [1968] 69 Cal.2d 765 [73 Cal.Rptr. 10, 447 P.2d 106, 34 A.L.R.3d 454]), it must assume the burden of assuring that its appointment does not result in a denial of effective counsel because of some possible conflict. [Citations.]" (*People* v. *Cook* (1975) 13 Cal.3d 663, 671 [119 Cal.Rptr. 500, 532 P.2d 148], cert. den. (1975) 423 U.S. 870 [46 L.Ed.2d 100, 96 S.Ct. 135]; *Maxwell* v. *Superior Court* (1982) 30 Cal.3d 606, 612 [180 Cal.Rptr. 177, 639 P.2d 248, 18 A.L.R.4th 333].) Where the evidence conflicts "concerning the nature and extent of the past and present attorney-client

---

in some way came to him later."

In connection with that ruling, the court had again asked defendant if he "wanted other counsel based on [the investigator's] employment," to which he replied: "No, I'll stay with the lawyer I have."

relationship, the trial court's findings based upon such conflicting evidence are conclusive on appeal. [Citations.]" (*People* v. *Yorn* (1979) 90 Cal.App.3d 669, 674 [153 Cal.Rptr. 295].)

We have held that "even a potential conflict may require reversal if the record supports 'an informed speculation' that appellant's right to effective representation was prejudicially affected." (*People* v. *Mroczko, supra*, 35 Cal.3d at p. 105.) But "[p]ermissible speculation giving rise to a conflict of interest may be deemed an informed speculation ... only when such is grounded on a factual basis which can be found in the record." (*People* v. *Cook, supra*, 13 Cal.3d at pp. 670-671.)

Here the record does not establish an actual or potential conflict of interest. Attorney Schick, an officer of the court, "'"[was] in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." [Citation.]'" (*People* v. *Mroczko, supra*, 35 Cal.3d at p. 112.) He represented to the court that he personally had no prior contact with Vasquez. The attorney from Schick's firm who had handled Vasquez's earlier case was now in private practice in another locale; the file in that case had long since been destroyed.

Alternatively, defendant urges that Schick's ethical obligations to his firm's former client precluded him — perhaps subliminally — from fully exploiting Vasquez's prior criminal record in the presentation of Belmontes's defense. At oral argument appellate counsel suggested that Schick might have "self-censored himself" as a result of the conflict; at another point counsel took an opposite tack, suggesting Schick "didn't see the potential for conflict."

Trial counsel's performance, however, lends little support to the argument. Throughout the guilt and penalty phases Schick characterized Vasquez as the "ringleader" of the planned crime, emphasizing that Vasquez was older than defendant, and urging the jury to consider Vasquez's reputation in the local community;

his infidelity and mistreatment of Carrie Rogers who was supporting him; his former relationship with the victim; his threats to her right up through the morning of the murder; and his motive — consistent with defendant's claims — to do harm to McConnell, who had thrown him out of her house after he "ripped her off" several days prior to the murder. Further evidence of Vasquez's prior "specific instances of violent conduct," especially an earlier *charge* (the 1979 murder charge) *which had been dismissed*, would have been inadmissible to prove his conduct in the instant criminal episode. (Evid. Code, § 1101, subd. (a); Witkin, Cal. Evidence (2d ed. 1966) § 324, p. 287.) Moreover, given that the prosecution was proceeding on felony murder and conspiracy theories of vicarious liability, trial counsel had to weigh the tactical disadvantages of having the defense strengthen the case against Vasquez, thereby enhancing defendant's vicarious liability for Vasquez's criminal acts in the jurors' eyes.

The record affords no informed basis for concluding that a conflict of interest existed or affected trial counsel's performance to defendant's detriment.[7]

4. *Admissibility of Bolano's and Cobarrubio's Prior Consistent Statements*

Defendant contends that evidence of prior consistent statements of Bolanos and his girlfriend, Teresa Cobarrubio, were erroneously admitted without meeting the foundational requirements of Evidence Code sections 791 and 1236.[8]

---

7. In so concluding, we need not reach defendant's further claim that his waiver of the potential conflict of interest was not a knowing and informed one.

8. Section 1236 provides: "Evidence of a statement previously made by a witness is not made inadmissible by the hearsay rule if the statement is consistent with his testimony at the hearing and is offered in compliance with Section 791."
Section 791 provides: "Evidence of a statement previously made by a

Bolanos testified that he told Cobarrubio on the day after the murder defendant was the one who had killed McConnell during the burglary. No timely objection having been made to this testimony; the point has been waived on appeal. (*People* v. *Cannady* (1972) 8 Cal.3d 379, 388 [105 Cal.Rptr. 129, 503 P.2d 585]; *People* v. *Green, supra*, 27 Cal.3d at p. 22.) Defendant's purported citation to an objection on this point is unavailing. The "objection" he notes in the record went to Bolanos's testimony on a different matter (his initial false statement regarding the disposal of McConnell's stereo); was made on a nonhearsay ground; and was raised well beyond the point at which Bolanos gave the testimony here challenged.

Cobarrubio's testimony confirmed that Bolanos told her defendant had killed McConnell. This time there was an objection; to which the prosecutor responded: "We're offering it as a prior statement of Mr. Bolanos, given at a time when the motive imputed to him for why he should want to lie didn't exist."

One motive for fabrication or bias in Bolanos's testimony, explored at length during his cross-examination, was his favorable immunity agreement obtained in exchange for his testimony at defendant's trial. Defendant himself recognizes: "Of course Bolanos also had a strong motive to shift as much legal and moral culpability away from himself and on to the others [Belmontes and Vasquez] as well."

Bolanos had not yet been granted immunity from prosecution

---

witness that is consistent with his testimony at the hearing is inadmissible to support his credibility unless it is offered after:
"(a) Evidence of a statement made by him that is inconsistent with any part of his testimony at the hearing has been admitted for the purpose of attacking his credibility, and the statment was made before the alleged inconsistent statement; or
"(b) An express or implied charge has been made that his testimony at the hearing is recently fabricated ... and the statement was made before the ... motive for fabrication ... is alleged to have arisen."

for the murder at the time he related the prior statement — consistent with his trial testimony — to Cobarrubio. An immunity agreement has been recognized as a motive for bias within the meaning of Evidence Code section 791. (*People* v. *Pic'l* (1981) 114 Cal.App.3d 824, 862-863 [171 Cal.Rptr. 106].) "That there may always have existed another motive for fabricating did not deprive the prosecution of its right to show that a motive shown by the evidence did not affect the witness' testimony [citation]." (*People* v. *Cannady, supra*, 8 Cal.3d at p. 388.) Bolanos's prior consistent statement to Cobarrubio was thus admissible under Evidence Code section 791, subdivision (b).

Lastly, Deputy Gary Coffey testified about the statement he took from Cobarrubio prior to Bolanos's questioning and arrest. There was a hearsay objection; the prosecutor responded that evidence of Cobarrubio's prior statement was "being offered to rehabilitate her, after counsel suggested she was lying on the stand. ..."

Counsel impeached Cobarrubio on cross-examination with her statement to defendant's girlfriend, Barbara Murillo, made several months after the crime, to the effect that she might have agreed with Murillo that defendant could have been "set up." This statement was inconsistent with Cobarrubio's trial testimony. Evidence of her earlier statement to Deputy Coffey was inconsistent with her statement to Murillo — consistent with her trial testimony — and thus admissible as a prior consistent statement. (Evid. Code, §§ 791, subd. (a) & 1236.)

5. *Curtailment of Impeachment of Prosecution Witness Carrie Lynn Rogers*

Defendant argues that the court improperly restricted his cross-examination of prosecution witness Carrie Lynn Rogers regarding her motive for bias and fabrication.

On the date of the offense, Domingo Vasquez was living with Rogers, their daughter, and a friend, Laura Hernandez. Rogers

subsequently married Vasquez in jail three months after his arrest for McConnell's murder. Vasquez's motion to dismiss the felony-murder-burglary special circumstance as to him was granted. He ultimately pled guilty to second degree murder and second degree burglary and was sentenced to an indeterminate term of 15 years to life.

Rogers did not come forward to implicate defendant as the actual killer until shortly before the start of his trial. On direct examination, she testified that after the crime Vasquez refused to tell her why he had been picked up for questioning by the police. On the night following the murder, while in her kitchen, she overheard defendant discussing the murder with Vasquez and Bolanos in the living room, and heard defendant review how he had first entered McConnell's house alone and hit her several times with the bar, after which Vasquez had joined him in the house.

Prior to Rogers's cross-examination, defense counsel moved for permission to question her about the disposition of Vasquez's case. The theory of relevance was that Rogers's belated claim that defendant was the killer was motivated by her desire to promote her husband's chances for early release on parole. Defendant asserts that "[t]he indeterminate sentence disposition of Domingo Vasquez's case and the wide range of potential prison confinement provided Carrie Rogers Vasquez with a powerful motive to portray [defendant] as the ringleader and killer. An early release — or indeed any release — of Vasquez depends in large measure upon his involvement in the offense and his level of culpability. Mrs. Vasquez could well be expected to so understand, believe or hope. The jury was deprived of powerful impeachment evidence."

The prosecutor countered that there was undue potential for prejudice and misuse of the information,[9] and that counsel's

---

9. The jury was not told of Vasquez's negotiated plea to second degree murder, since the plea did not necessarily admit his role as the actual

theory of relevance for impeachment was highly speculative. The court prohibited cross-examination in this vein.

We recognize that "'[w]hile the trial judge has broad discretion to control the ultimate scope of cross-examination designed to test the credibility or recollection of a witness (*People* v. *Burton* (1961) 55 Cal.2d 328, 343 [11 Cal.Rptr. 65, 359 P.2d 433]) ...'" (*Jennings* v. *Superior Court* (1967) 66 Cal.2d 867, 877 [59 Cal.Rptr. 440, 428 P.2d 304]), "wide latitude" should be given to cross-examination designed to test the credibility of a prosecution witness in a criminal case. (*Curry* v. *Superior Court* (1970) 2 Cal.3d 707, 715 [87 Cal.Rptr. 361, 470 P.2d 345].) Nevertheless, we are unpersuaded by defendant's argument that the ruling was so unduly restrictive as to violate his Sixth Amendment right of confrontation.

In *Delaware* v. *Van Arsdall* (1986) 475 U.S. 673, 680 [89 L.Ed.2d 674, 684, 106 S.Ct. 1431], the United States Supreme Court reaffirmed that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness.' *Davis* v. *Alaska* [(1974) 415 U.S. 308, 94 S.Ct. 1105], at 318."

"But *Van Arsdall* emphasized that a trial judge has broad latitude in restricting cross-examination which is repetitive or only marginally relevant. (*Id.* [475 U.S. 673, 679-680].) There is no Sixth Amendment violation at all unless the prohibited cross-examination might reasonably have produced 'a

---

killer, could have been based on felony-murder-accomplice liability, and thereby could have served to enhance the prosecution's case against defendant. Evidence of Vasquez's disposition (an indeterminate prison term) was irrelevant to a determination of defendant's degree of participation or role in the crimes.

significantly different impression of [the witness's] credibility. ...' (*Id.* [475 U.S. 673, 680].) If cross-examination was improperly restricted, the prejudicial effect of the error on the trial as a whole depends on a multitude of factors, including the cumulative nature of the lost information, the extent of cross-examination otherwise permitted, the degree of evidence corroborating the witness, and the overall strength of the prosecution case. (*Id.* [475 U.S. 673, 684].)" (*People* v. *Rodriguez* (1986) 42 Cal.3d 730, 751, fn. 2 [230 Cal.Rptr. 667, 726 P.2d 113].)

Here the jury learned Rogers had been with Vasquez for eight years and had married him shortly after his arrest for McConnell's murder; that they had a daughter together; that she was seeing Vasquez on a weekly basis at the time of trial; that she had been living with Vasquez and supporting him on the date of the murder; that she knew Vasquez was keeping company with other women at that time and nonetheless "didn't do anything about it"; and that she did not come forward to report her information inculpating defendant as the killer until the eve of his trial. Nor did the prosecutor in his closing argument make any attempt to clothe Rogers with a false aura of veracity.[10/]

We conclude the trial judge was within his discretion in ruling that the proffered line of cross-examination was potentially

---

10. The prosecutor conceded in his opening argument: "[C]ounsel has suggested to you [Rogers] has a very definite interest in protecting a man, Domingo Vasquez, with whom she lives. Certainly, ladies and gentlemen of the jury, somebody that would marry someone who's been involved in something like this, when he's been cheating on her and she knows about it, that's loyalty. What else can you call it? [¶] And you have to take that into account in deciding whether to believe [Rogers]. Let's face it. That really calls into question her story." Defense counsel picked up the thread in his own closing argument: "Carrie Rogers — and I certainly would second [the prosecutor's] comments about Carrie Rogers' motives to come in here and lie for a man who she has certainly stood by through thick and thin who certainly has not stood by her." And in his closing argument, the prosecutor invited the jury to discount Rogers's testimony "because she is loyal to Domingo."

prejudicial and would not reasonably have produced "a significantly different impression of [Rogers's] credibility. ..." (*Van Arsdall, supra*, 475 U.S. at p. 680 [89 L.Ed.2d at p. 684].) Even were we to assume error of constitutional magnitude, given the totality of circumstances under which Rogers's testimony was presented — particularly defendant's own testimony that he struck

McConnell at least the one blow with the bar — no prejudice warranting reversal would be shown.

6. *Conflicting Instructions on Evaluation of Accomplice Testimony*

Defendant acknowledges that the court gave the full panoply of standardized instructions advising the jury that Bolanos was an accomplice as a matter of law (CALJIC No. 3.16); defining "accomplice" (CALJIC No. 3.10); and advising that his testimony had to be viewed with distrust (CALJIC No. 3.18) and needed corroboration (CALJIC Nos. 3.11 and 3.12). Defendant claims, however, that the purpose of these instructions was undermined to his prejudice by the giving of CALJIC No. 2.27, which allows the jury to find any fact on the testimony of one witness, and CALJIC No. 2.11.5, which cautions the jury against speculation as to the prosecution or nonprosecution of accomplices.

a. CALJIC No. 2.27

CALJIC No. 2.27 was requested *by defendant*. Trial counsel never proposed that it conflicted with the accomplice testimony corroboration requirement. Nevertheless, since the corroboration requirement of section 1111 is a "substantial right" we shall address the claim. (§ 1259; *People* v. *Chavez* (1985) 39 Cal.3d 823, 830 [218 Cal.Rptr. 49, 705 P.2d 372].)

In *Chavez, supra*, we held that the giving of CALJIC 2.27 in conjunction with accomplice instructions was not error per se, but we agreed with the suggestion of the Court of Appeal in

People v. *Stewart* (1983) 145 Cal.App.3d 967, 975 [193 Cal.Rptr. 799], that it should contain an explicit reference to testimony requiring corroboration. (*Chavez, supra*, 39 Cal.3d at p. 831.)

As in *Chavez*, here, looking to the instructions as a whole we find no error. (*Id.*, at pp. 830-831.) Both the prosecution and the defense proceeded on the premise that corroboration was needed. (*Id.*, at p. 831.) The prosecutor reiterated in his closing argument that Bolanos's testimony needed to be corroborated, cautioned that it must be viewed with distrust, and summarized the evidence which he believed would support defendant's guilty verdicts independent of Bolanos's testimony. Bolanos himself conceded that he was testifying because: "I'm ordered here or else that murder case would be up on me again if I'm not here," and acknowledged that he was more concerned about his own fate than that of defendant or Vasquez.

Moreover, the record belies defendant's assertion that Bolanos's testimony "went almost completely uncorroborated." It was corroborated by the testimony of Lucy Flores, Carrie Rogers, defendant's girlfriend Barbara Murillo, and crucially, by defendant himself. He admitted, both in his extrajudicial statements and trial testimony, that he first entered McConnell's house alone; dealt her the first blow with the iron bar; implored Vasquez to grab the stereo components and run; exited with blood on his clothes; wiped blood off the bar; and threw it in the river. He confirmed Bolanos was the "wheel man" and never entered the house. The murder weapon, recovered with Bolanos's assistance; defendant's bloodstained shoe; the number and severity of McConnell's head wounds; and the autopsy physician's testimony (that infliction of the blows would have made sounds like "a cracked pot"); all further corroborated Bolanos's account of the crimes.

We conclude there was no prejudicial error from the giving of unadorned CALJIC No. 2.27.

b. CALJIC No. 2.11.5

CALJIC No. 2.11.5 instructs: "There has been evidence in this case indicating that a person other than defendant was or may have been involved in the crime for which defendant is on trial. [¶] You must not discuss or give any consideration as to why the other person is not being prosecuted in this trial or whether he has been or will be prosecuted."

There is no merit to defendant's claim that, so charged, the jury might have believed it was prohibited from considering the "nonprosecution" of Bolanos. The instruction was patently directed at Vasquez. The jury knew Bolanos had pled guilty to burglary, was awaiting imposition of sentence therefor, and had been granted immunity from prosecution for McConnell's murder. Defendant's suggestion that the jury might have understood CALJIC No. 2.11.5 as applying to Bolanos, thereby precluding them from weighing the existence or nonexistence of bias, interest or other motive in assessing his credibility (see CALJIC No. 2.20), is implausible. It would require us to find that the jury rejected nearly all of the accomplice testimony instructions and disregarded as irrelevant counsel's considerable efforts to impeach Bolanos in his cross-examination and closing argument.

Defendant further argues that the instruction "might have misled the jury into believing that Vasquez was not being prosecuted, although they could not consider why." He hinges this contention on the predicate in the instruction: "You must not discuss or give any consideration as to why [a possible accomplice] is not being prosecuted in this trial. ..." In doing so he ignores the concluding clause of the instruction, which states: "or whether he has been or will be prosecuted." The instruction in its entirety itself defeats his claim.

7. Instruction on Defendant's Failure to Deny or Explain Certain Evidence (CALJIC No. 2.62)

The jury was instructed with CALJIC No. 2.62 (1980 rev.), which pertains to the inferences that might be drawn from defendant's failure to explain or deny prosecution evidence of facts within his personal knowledge. "It correctly explained that defendant has a constitutional right to decline to testify, but that his failure to deny or explain facts within his personal knowledge

may be considered as supporting the prosecution evidence at issue. It also correctly advised that such failure to deny or explain does not create any presumption or warrant any inference of guilt, or relieve the prosecution of its proof burden." (*People* v. *Ghent* (1987) 43 Cal.3d 739, 763 [239 Cal.Rptr. 82, 739 P.2d 1250].) There was no objection to the instruction.

Defendant contends that "[t]he instruction in conjunction with the prosecutor's argument constituted prejudicial error because (1) the record discloses that [defendant] did *not* fail to explain or deny any prosecution evidence; and (2) the purported failures to explain or deny argued by the prosecution were tangential, collateral and of little importance."

We disagree on both counts. Defendant testified he heard Bolanos and Vasquez drive up, and that Vasquez came right to the front door and would not have had time to open Bolanos's trunk. But as the prosecutor argued, defendant failed to explain Bolanos's conflicting testimony, corroborated by the testimony of a disinterested neighbor (Lucy Flores), that Vasquez *did* first attempt to open the trunk before entering the house.

Defendant testified he struck McConnell the one blow to the head with the bar, and that she fell to the ground but was "still breathing." But he failed to explain the autopsy surgeon's conflicting conclusion that the injury resulting therefrom in probability would not have rendered McConnell unconscious, nor how the victim would come to have suffered the many defensive wounds — clearly evidencing her struggle for life as she was being beaten — if his version was true.

Defendant testified that he ran through the rear of the house looking for things to steal, returning within seconds to find Vasquez standing over McConnell holding the bar. He denied ransacking the front master bedroom, testifying it "[m]ust have been [Vasquez]." But as the prosecutor fairly argued, defendant failed to explain how Vasquez could have beaten the victim so extensively and ransacked the master bedroom; all in a matter of "seconds." Defendant also claimed he neither saw nor heard Vasquez beating McConnell because he was not "paying attention," but he failed to explain how he could not have heard the 15 to 20 blows to the victim's head, which Bolanos heard from outside the house, and which, according to the autopsy surgeon, in all probability would have sounded "like a cracked pot" as they landed, cracking the victim's skull.

There were other crucial points of conflict between defendant's extrajudicial statements and trial testimony on the one hand, and the physical evidence and testimony of witnesses on the other. Without belaboring the point, our review of the record indicates that these and other such conflicts were hardly "tangential, collateral and of little importance." "[I]f the defendant tenders an explanation which, while superficially accounting for his activities, nevertheless seems bizarre or implausible, the inquiry whether he reasonably should have known about circumstances claimed to be outside his knowledge is a credibility question for resolution by the jury [citations]." (*People* v. *Mask* (1986) 188 Cal.App.3d 450, 455 [233 Cal.Rptr. 181].)

8. *Doyle - Massiah Error*

Defendant contends that the prosecutor committed *Doyle* error (*Doyle* v. *Ohio* (1976) 426 U.S. 610 [49 L.Ed.2d 91, 96 S.Ct. 2240]) when he cross-examined defendant regarding his postarrest silence. He further asserts that those same questions violated his right to counsel. (*Massiah* v. *United States* (1964) 377 U.S. 201 [12 L.Ed.2d 246, 84 S.Ct. 1199].) We conclude that under the circumstances the prosecutor's questions had the potential to, but did not, ripen into *Doyle* error. Nor did they

infringe upon defendant's Sixth Amendment rights.

The offending colloquy went as follows:

"[PROSECUTOr]: Q. Mr. Belmontes, from the time you talked to Deputy Holman and Deputy Cooper at the San Joaquin County Jail on March 22nd, 1981, until today in this very courtroom you have never spoken to law enforcement concerning what happened on March 15th, 1981?

"[DEFENDANT]: A. Have I spoken to officers?

"Q. About it. That's right.

"A. From the first day I got arrested until now?

"Q. No. From the jail statement on Sunday, when you were booked in the county jail and gave the third statement we have been calling the jail statement, until now you've never told law enforcement officers about it, anything else that happened there?

"A. No.

"[DEFENSE COUNSEL]: Judge, in fairness, I think the jury should be instructed once he's appointed an attorney, that conversation has to be directed through the attorney.

"[THE COURT]: Yes. The question, ladies and gentlemen, is somewhat misdirected in the sense that Mr. Belmontes does not have to talk to anybody. As a matter of fact, he's admonished by his counsel, once lawyers have been appointed to represent him, not to talk to anybody. You should be aware of that fact. Without the presence of the lawyer.

"[PROSECUTOR]: Q. All right. So from then until now

you haven't been on the record about what happened?

"[DEFENDANT]: A. Not on the record. But a few times Officer Holman has taken me to court while we were in Lodi we talked about it. But not on record.

"Q. About the details of the offense?

"A. Not really details. Just told him that I didn't do it. Told him that I was serious about when I said I hit the girl one time."

The petitioners in *Doyle* were arrested on narcotics charges. They were given *Miranda* warnings (*Miranda* v. *Arizona, supra*, 384 U.S. 436), made no postarrest statements about their involvement in the crime, and for the first time at trial contended they had been framed by a government informant. During cross-examination the prosecutor repeatedly sought to impeach their exculpatory story by asking them why they had failed to assert the "frame-up" defense earlier. The trial court overruled defense counsel's timely objections to this line of inquiry, and permitted the prosecutor to argue petitioners' postarrest silence to the jury. (*Doyle, supra*, 426 U.S. 610 at pp. 613-615, and fn. 5 [49 L.Ed.2d 91 at pp. 95-96].) The high court reversed the convictions, holding that *Miranda* prohibited such questioning and argument as a proper means of impeachment. (*Id.*, at p. 617 [49 L.Ed.2d at p. 97].)

Here, the prosecutor did not ground his case on the theory that defendant had refused to talk to the police. Defendant waived his *Miranda* rights and furnished three statements. He testified that he voluntarily spoke with the officers about the crime en route from Southern California back to Stockton. In short, there were no *facts* supportive of an inference of "postarrest silence" placed before the jury. Indeed the defense itself urged that defendant's trial testimony was essentially consistent with his jailhouse statement made over a year earlier.

The Attorney General argues that the prosecutor's questions were merely designed to point out the inconsistencies between defendant's extrajudicial statements and trial testimony — a permissible avenue of impeachment. (See *People* v. *Barker* (1979) 94 Cal.App.3d 321, 329-330 [156 Cal.Rptr. 407]; *People* v. *Farris* (1977) 66 Cal.App.3d 376, 390 [136 Cal.Rptr. 45]; *People* v. *Love* (1977) 75 Cal.App.3d 928, 934 [142 Cal.Rptr. 532].) Perhaps that is where they were intended to lead. As worded, however, they just as readily could have elicited defendant's testimony that he made no statements about the crime between his third jailhouse statement and trial, and thus technically ran afoul of *Doyle, supra*, 426 U.S. 610.

But upon counsel's objection to the questions, the trial judge immediately admonished the jury that "Mr. Belmontes does not have to talk to anybody" and that "he's admonished by his counsel ... not to talk to anybody." (See *Greer* v. *Miller* (1987) 483 U.S. 756, ___ [97 L.Ed.2d 618, 630-631, 107 S.Ct. 3102] [similar curative admonition].) "Unlike the prosecutor in *Doyle*, the prosecutor in this case was not 'allowed to undertake impeachment on,' or 'permit[ted] ... to call attention to,' [defendant's] silence." (*Id.*, at p. ___ [97 L.Ed.2d at pp. 630-631], quoting *Doyle, supra*, 426 U.S. at p. 619, & fn. 10 [49 L.Ed.2d at p. 98].)

Any error was clearly harmless beyond a reasonable doubt. (*Greer* v. *Miller, supra*, 483 U.S. at p. ___ [97 L.Ed.2d at p. 630]; *Chapman* v. *California* (1967) 386 U.S. 18 [17 L.Ed.2d 705, 87 S.Ct. 824, 24 A.L.R.3d 1065]; cf. *People* v. *Jackson* (1980) 28 Cal.3d 264, 305 [168 Cal.Rptr. 603, 618 P.2d 149].) The prosecutor's questions were brief and unaccompanied by any suggestion that an inference of guilt should be drawn therefrom. Belmontes presented virtually no defense to the overwhelming evidence that a felony murder had occurred, namely, a murder committed in the course of a burglary. (§ 189.) The evidence further supported the jury's findings that he personally, intentionally, and wilfully administered the fatal beating to McConnell. When asked on direct examination: "Did you

contribute to her death?" defendant replied: "Yes." When asked "How?" he acknowledged: "I was involved. I hit her. ..." Although he claimed he struck McConnell only the one blow across her temple, that wound was apparently of insufficient force to lacerate the victim's skin — a circumstance wholly inconsistent with his own admission that he was covered with blood and that he alone had to change his pants at Manuel Vasquez's house after the crime. The nature of McConnell's gaping head wounds; the blood splattered about defendant's face, clothing, and the walls and door jambs next to where she was found; and the many defensive bruises on her arms, hands, legs and feet all evidenced a desperate struggle for life as defendant bludgeoned her with the iron bar.

We likewise reject defendant's related claim under *Massiah* v. *United States, supra*, 377 U.S. 201. There is no showing that the officers in this case at any stage of their investigation transgressed defendant's Sixth Amendment right to counsel. Having concluded that defendant's "postarrest silence" was neither shown by the evidence nor urged before the jury, we decline his further invitation to speculate that the prosecutor's complained-of questions "attribut[ed] a consciousness of guilt to the defendant for following his lawyer's advice ..." and remaining silent.

9. *Uncharged Conspiracy Instructions*

Both defendant and Bolanos revealed in their pretrial statements that they met with Vasquez at the latter's house on the morning of the murder and specifically agreed and conspired to burglarize McConnell's house. Defendant admitted in his statement that overt acts were carried out in furtherance of the planned crime prior to the point at which he knocked on McConnell's door and found her home. He had armed himself with the bar and split up from his cohorts who, according to predesigned plan, were to meet him at the house at a given time and assist in loading the stolen items into the trunk of Bolanos's Chevy.

However, defendant's claim that he personally abandoned any intent to steal when McConnell bid him entry, and his further assertion that shortly thereafter Vasquez had forced entry into the home and commanded him to strike the victim, were also reflected in his statement. Anticipating what would likely be the gist of Belmontes's defense in light of his pretrial statements, the prosecutor elected to proceed on an alternative uncharged conspiracy theory of vicarious liability in addition to the actual malice-premeditation and felony-murder theories of guilt.

Defendant acknowledges that the People proceeded on these three distinct theories of guilt. In his briefs he criticizes but "does not at this point challenge the validity of conspiracy theory in general to establish guilt of a substantive crime. ..."[11/] Rather, he asserts error in (1) the failure to instruct that the existence of a conspiracy must be found beyond a reasonable doubt, and (2) the giving of CALJIC No. 6.20 which, he claims, improperly shifted the burden of proving withdrawal from the conspiracy onto him.

a. *Appropriateness of Uncharged Conspiracy Instructions*

Although not raised as a separate challenge to the verdicts of guilt, defendant cites law review commentary to "emphasize the illegitimacy" of permitting the prosecution to proceed on an alternate theory of uncharged conspiracy liability. He asserts such is more appropriately reserved for "combatting complex criminal organizations" or "providing a preemptive social defense against a dangerous design prior to the flash point when it becomes an attempt or completed crime." (See Note, *The*

---

11. Contrary to defendant's assertion, our review of the record reveals that the prosecutor announced his intention to proceed on an alternate conspiracy theory in his opening statement, and that defense counsel did not explicitly object to the prosecutor's election to proceed on such theory or to the standard conspiracy instructions requested and given. Counsel did separately submit his own request for aider-abettor liability instructions, which was denied. (See defendant's argument 11, post, at p. 793.)

Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants (1948) 62 Harv. L.Rev. 276, 284-286.)

It is long and firmly established that an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator. (*People* v. *Lopez* (1963) 60 Cal.2d 223, 250 [32 Cal.Rptr. 424, 384 P.2d 16] [uncharged conspiracy to commit burglaries admissible to prove identity of murderer]; *People* v. *Pike* (1962) 58 Cal.2d 70, 88 [22 Cal.Rptr. 664, 372 P.2d 656] [uncharged conspiracy to commit robberies admissible to prove armed robbery culminating in murder].) "Failure to charge conspiracy as a separate offense does not preclude the People from proving that those substantive offenses which are charged were committed in furtherance of a criminal conspiracy [citation]; nor, it follows, does it preclude the giving of jury instructions based on a conspiracy theory (*People* v. *Washington* (1969) 71 Cal.2d 1170, 1174 [81 Cal.Rptr. 5, 459 P.2d 259, 39 A.L.R.3d 541]; *People* v. *Ditson* (1962) 57 Cal.2d 415, 447 [20 Cal.Rptr. 165, 369 P.2d 714])." (*People* v. *Remiro* (1979) 89 Cal.App.3d 809, 842 [153 Cal.Rptr. 89, 2 A.L.R.4th 1135].)

The evidence here showed that defendant, Vasquez and Bolanos met, specifically intended to agree or conspire, specifically intended to commit the planned burglary, and carried out overt acts in furtherance of the conspiracy — completing the intended crime. There being evidence supportive of all the elements of a conspiracy, the People were entitled to proceed on that alternative theory of liability. (*People* v. *Horn* (1974) 12 Cal.3d 290, 296 [115 Cal.Rptr. 516, 524 P.2d 1300].)

b. *Failure to Instruct on Existence of Uncharged Conspiracy Beyond a Reasonable Doubt*

The jury was charged with nine standardized instructions which fully defined all relevant principles underlying the

People's alternative uncharged conspiracy theory of liability.[12] Defendant complains, however, that it was reversible error not to further instruct the jury that the existence of a conspiracy at the time of the killing must be proved *beyond a reasonable doubt* as a prerequisite for vicarious liability.[13]

A similar contention was rejected in *People* v. *Jourdain* (1980) 111 Cal.App.3d 396 [168 Cal.Rptr. 702]. Jourdain, like defendant here, argued he was denied due process of law because the standard conspiracy instructions permitted the jury to connect him to the illegal uncharged conspiracy and thereby convict him upon a standard lower than "beyond a reasonable doubt."

In rejecting claimed error in the refusal to give defendant's proferred "beyond a reasonable doubt" instruction, the *Jourdain* court reasoned: "That argument misses the point. The People had not charged appellant with, nor were they trying to convict him of, conspiracy. ... [¶] The admission of [evidence of conspiracy] was not affected by the fact the information had not charged a conspiracy (*People* v. *Morales* ([1968]) 263 Cal.App.2d 368 [69 Cal.Rptr. 402]), and once there had been proof of the existence of the conspiracy there was no error in instructing the jury on the

---

12. These included the definition of an uncharged conspiracy and requisite overt act (CALJIC No. 6.10.5), and instructions explaining the nature of joint conspiratorial responsibility (CALJIC No. 6.11); that proof of express agreement was not required (CAJIC 6.12); that evidence of association alone does not prove membership in the conspiracy (CALJIC No. 6.13); that there is no criminal liability for independent acts of coconspirators not in furtherance of the common criminal design (CALJIC Nos. 6.15 and 6.16); that commission of an act in furtherance of a conspiracy does not itself prove membership in the conspiracy (CALJIC No. 6.18); that only an affirmative and bona fide rejection or repudiation of the conspiracy communicated to the coconspirators will effectuate withdrawal from the conspiracy (CALJIC No. 6.20); and that no shared criminal liability attaches to a conspirator's acts committed after termination of the conspiracy (CALJIC No. 6.21).

13. Although we address the claim on the merits, we note again that defendant failed to proffer a proposed instruction or otherwise object to the standard conspiracy instructions on this ground.

law of conspiracy. (*People* v. *Remiro* (1979) 89 Cal.App.3d 809, 842; *People* v. *Washington* (1969) 71 Cal.2d 1170, 1174.) In so charging the jury the court was not in any way indicating that appellant was being tried for the crime of conspiracy. Rather, the court was merely instructing the jury on the law applicable to the case. (Pen. Code, § 1093.). ... [¶] ... There was only one instruction on the burden of proof given to the jury. That instruction told the jury in terms of Penal Code section 1096 that it could not find appellant guilty until his guilt had been proved beyond a reasonable doubt. (CALJIC No. 2.90.)" (*People* v. *Jourdain, supra*, 111 Cal.App.3d at pp. 403-404.)[14]

As instructed, the jury here was not told it could find defendant guilty on an uncharged conspiracy theory upon less than reasonable doubt. CALJIC No. 2.90 was given. Moreover, the jury's verdicts and special findings reflect that they found defendant's guilt of McConnell's murder beyond a reasonable doubt both on actual malice-premeditation and felony-murder-burglary theories.

c. *Impermissible Shifting of Burden of Proving Withdrawal From the Conspiracy*

We further reject defendant's argument that instructing the jury in accordance with CALJIC No. 6.20 (that only an affirmative and bona fide rejection or repudiation of the conspiracy communicated to the coconspirators will effectuate withdrawal from the conspiracy) impermissibly shifted the burden of proof

---

14. Jourdain argued his jury should have been instructed that it must find his *membership in the conspiracy* beyond a reasonable doubt. Here defendant argues the jury should have been instructed it must find *the existence of the conspiracy* beyond a reasonable doubt. For purposes of our analysis these distinctions are not critical. Jourdain's argument was essentially the same as Belmontes's, i.e., that under the standard instructions "the jury could find him guilty of conspiracy upon something less than reasonable doubt." (*Jourdain, supra*, 111 Cal.App.3d at p. 403.)

on such matter to him. As we stated in *People* v. *Crosby* (1962) 58 Cal.2d 713, 731 [25 Cal.Rptr. 847, 375 P.2d 839]: "It is not part of the People's prima facie case to negate the possibility of such a withdrawal. Once the defendant's participation in the conspiracy is shown, it will be presumed to continue unless he is able to prove — as a matter of defense — that he effectively withdrew from the conspiracy ...."

Under CALJIC No. 6.20 the burden is upon the defendant to go forward with evidence of his withdrawal from the conspiracy. His burden is one of production — not persuasion beyond a reasonable doubt of his nonmembership in the conspiracy. Here, defendant made no attempt whatsoever to suggest how he had affirmatively withdrawn from or repudiated his role in the conspiracy to burglarize McConnell's house, much less communicated the same to Vasquez.[15] Nor under these facts could he readily have done so — *by his own testimony* he felled McConnell with a blow to her head with the iron bar, immediately went about ransacking the rear rooms of her house, ripped out the wires and grabbed a stereo component, then had to urge Vasquez to assist in carrying out the booty as the two fled from the murder scene.

The People properly proceeded on the alternative uncharged conspiracy theory of liability. No prejudice from the giving of the standardized conspiracy instructions is shown.

10. *Special Findings*

The special findings made by the jury in connection with the verdict of guilt of first degree murder were as follows: (1) "We further find that the murder was wilful, deliberate and premeditated"; (2) "We further find that the murder was intentional"; (3) "We further find that the defendant Fernando Belmontes, Jr., personally committed the killing"; and (4) "We

---

15. Defendant has conceded that he "fail[ed] to make an affirmative declaration of withdrawal from the conspiracy agreement."

further find that the killing occurred as a result of the commission or attempted commission of the crime of burglary." Two additional special findings were found true in connection with special circumstance: "We further find that the defendant, Fernando Belmontes, Jr., is the actual killer," and "We further find that the defendant, Fernando Belmontes, Jr., in the commission of the special circumstance had the specific intent that death occur."[16]

Defendant argues that these findings were unauthorized "special verdicts" within the meaning of section 1150 and thus violative of his due process rights. (See fn. 17.) We have recently rejected identical arguments and approved the use of "special findings" at the guilt phase such as were made here. (*People* v. *Miranda* (1987) 44 Cal.3d 57, 89-90 [241 Cal.Rptr. 594, 744 P.2d 1127]; *People* v. *Burgener* (1986) 41 Cal.3d 505, 536-538 [224 Cal.Rptr. 112, 714 P.2d 1251]; *People* v. *Davenport* (1986) 41 Cal.3d 247, 273-275 [221 Cal.Rptr. 794, 710 P.2d 861]; *People* v. *Phillips* (1985) 41 Cal.3d 29, 59 [222 Cal.Rptr. 127, 711 P.2d 423].)[17] Moreover, in contrast to Burgener, here the

---

16. The only special finding left undated and unsigned by the jury foreman was: "We further find that the defendant, Fernando Belmontes, Jr., intentionally aided, abetted, or assisted in the killing itself and in the commission of murder of the first degree."

The Attorney General argues that its rejection "is most reasonable in light of all the other special findings which negate any findings of guilt under the aider and abettor theory." Defendant counters that such inference cannot be drawn because the jury was instructed on a conspiracy — not aider-abettor — theory of vicarious liability. In light of the other explicit special findings which were found true, we need place no reliance on the jury's failure to make the special finding on aider-abettor liability in reaching our conclusion that defendant was found to be the actual, intentional killer.

17. The utility of such special findings may depend upon which or how many special circumstances are charged. For example, where there is "more than one special circumstance ... charged, but a unanimous finding of guilt on one of them is required before the offense becomes a capital crime, particularized verdicts on each special circumstance are essential." (*People* v. *Davenport, supra*, 41 Cal.3d at pp. 274-275.) We emphasize, however, that section 190.4, subdivision (a), does not *require* "special findings"

jury was explicitly instructed in connection with the special findings that they could only be found true unanimously and beyond a reasonable doubt.

Nor is there any merit to defendant's claim that the special finding of premeditation and deliberation is factually unsupported. Defendant's admitted acts of arming himself with the iron bar, following McConnell to the front door when Bolanos and Vasquez were heard driving up, and striking her in the head with the bar with as much force as he could muster in a "back-handed sweeping motion," alone support the jury's finding of premeditation and deliberation beyond a reasonable doubt. (See *People* v. *Anderson* (1968) 70 Cal.2d 15 [73 Cal.Rptr. 550, 447 P.2d 942].)

Lastly, we reject out of hand defendant's further arguments that the special findings were "unreliable, ambiguous, and meaningless surplusage," and that defense counsel had no "notice of" their "potential legal significance" or "opportunity to contest their factual basis." The charges and special circumstance alleged in the information, as well as the record of proceedings on pretrial motions and the prosecutor's opening statement, all belie these assertions. Defendant's own extrajudicial admissions that he armed himself before entering McConnell's residence, personally felled her with a blow from the iron bar, and completed the burglary and fencing of the stereo, surely put counsel on notice of the independent viability of the People's premeditated-murder *and* felony-murder theories of guilt.

11. *Refusal to Instruct on Lesser-related Offenses and Aider-abettor Liability*

In reliance on our opinion in *People* v. *Geiger* (1984) 35

---

beyond "what the statutory language calls for: a finding of the truth or lack of *truth* of each circumstance, not the facts upon which the finding is based." (*Id.*, at p. 275; cf. *People* v. *Ghent, supra*, 43 Cal.3d at pp. 762-763 [1977 death penalty law].)

Cal.3d 510 [199 Cal.Rptr. 45, 674 P.2d 1303, 50 A.L.R.4th 1055], defendant contends it was error to refuse his requested instructions on the *lesser-related* offenses of assault with a deadly weapon, battery, and simple theft. Recognizing that we expressly declared the rule in Geiger to be prospective only (*id.*, at p. 532, fn. 13), he nevertheless urges "that a narrow exception of retroactivity should be carved for capital appellants." We decline the invitation. We explained in *Geiger* that "the purpose of instructing on related offenses is primarily prophylactic ...." (*Ibid.*) Moreover, these facts do not support the possibility that the jury would have convicted defendant of the lesser-related offenses under the refused instructions.

We further reject defendant's claim that it was prejudicial error to refuse his requested instructions on aider-abettor liability. (CALJIC Nos. 3.00-3.02.) The court refused to so instruct the jury because the People had elected to proceed on an uncharged conspiracy theory of vicarious liability. Belmontes's hollow defense would have fared no better under aider-abettor instructions. Under conspiracy law the People had a higher burden of proof; having to establish specific intent to conspire and commit the burglary, as well as completion of overt acts in furtherance thereof. Moreover, in order to withdraw from the planned burglary as an aider-abettor, defendant would have had to have notified his accomplices *and further* done everything in his power to prevent commission of the crime. (CALJIC No. 3.02.) In contrast, to withdraw from a conspiracy, one need only make an affirmative repudiation communicated to his coconspirators. (CALJIC No. 6.20.) Defendant proferred no facts suggestive of his "withdrawal" under either theory. In any case, given the evidence and special findings made by the jury, any error in refusing the requested aider-abettor instructions was necessarily harmless.

C. SPECIAL CIRCUMSTANCE ISSUES

1. *Carlos Error*

Defendant urges that we strike the special circumstance under authority of *Carlos* v. *Superior Court* (1983) 35 Cal.3d 131 [197 Cal.Rptr. 79, 672 P.2d 862], wherein we held that intent to kill is an element of the felony-murder special circumstance of the 1978 death penalty law, whether applied to accomplices or to actual killers. (*Id.*, at pp. 153-154.) His contention must be rejected.

The United States Supreme Court has made clear that felony murderers who personally killed may properly be subject to the death penalty in conformance with the Eighth Amendment — after proper consideration of aggravating and mitigating circumstances — even where no intent to kill is shown. (*Cabana* v. *Bullock* (1986) 474 U.S. 376, 386-387 [88 L.Ed.2d 704, 716-717, 106 S.Ct. 689, 697]; see *Tison* v. *Arizona* (1987) 481 U.S. 137, 152 [95 L.Ed.2d 127, 141, 107 S.Ct. 1676, 1685].) Subsequently, "[i]n *People* v. *Anderson* [(1987) 43 Cal.3d 1104, 1147 [240 Cal.Rptr. 585, 742 P.2d 1306]], we held that with respect to the actual killer, the court need not instruct on intent to kill in connection with felony-murder special circumstances. Such an instruction is required only when there is evidence from which the jury could find that the defendant was an accomplice rather than the actual killer." (*People* v. *Gates* (1987) 43 Cal.3d 1168, 1193 [240 Cal.Rptr. 666, 743 P.2d 301].)

Here the jury made express findings that defendant *personally* committed an intentional, wilful, deliberate, premeditated murder; that the killing was the result of the commission or attempted commission of the burglary; and that defendant was the *actual killer* and had harbored specific intent to kill. We have rejected the several grounds upon which defendant urges that these special findings were procedurally defective. (*Ante*, at pp. 793-794.) The evidence supports the jury's findings beyond a reasonable doubt that defendant *personally* and *intentionally* killed McConnell — and its rejection of his claim that Vasquez was in the house at the time and "must have" killed her while he

(defendant) was busy ransacking the house.[18]

2. *Construing the Felony-murder Special Circumstance as Limited to Premeditated and Deliberate Murders*

Defendant urges us to construe the felony-murder special circumstance (§ 190.2, subd. (a)(17)) as limited to *premeditated* and *deliberate* intentional murders. Such was the requirement under the former 1977 death penalty legislation. (*Carlos, supra*, 35 Cal.3d at pp. 138-143.) In *Carlos* we recognized that "[t]he 1978 initiative repealed provisions of the 1977 act requiring physical presence and a wilful, deliberate, and premeditated killing before the jury could find a felony-murder special circumstance." (*Id.*, at p. 143.) The United States Supreme Court has since made it clear that the Eighth Amendment too does not compel such limitations upon death-qualifying felony murders. (*Cabana* v. *Bullock, supra*, 474 U.S. at pp. 386-387 [88 L.Ed.2d at pp. 716-717, 106 S.Ct. at p. 697]; see *Tison* v. *Arizona, supra*, 481 U.S. at p. 152 [95 L.Ed.2d at p. 141, 107 S.Ct. at p. 1685].)

3. *Corroboration of Accomplice Testimony to Prove Special Circumstance*

Defendant renews his assertion that the only evidence of his intent to kill came from the uncorroborated accomplice testimony of Bolanos. He argues such as a separate ground for reversal of the special circumstance finding.

---

18. In any event, in anticipation of our former Carlos holding, the trial court modified CALJIC No. 8.80, instructing the jury that: "If the defendant was not the actual killer, it must be proved beyond a reasonable doubt that he intentionally aided, abetted, counseled, commanded, induced, solicited, requested or assisted the actual killer in the killing itself and in the commission of the murder in the first degree before you are permitted to find the alleged special circumstance of that first degree murder to be true as to Mr. Belmontes." Thus, even had the proposed special findings not been made by the jury — under the modified instruction — defendant was clearly found to have acted with specific intent to kill.

Section 190.4, subdivision (a), provides in relevant part that: "Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime." We have already rejected defendant's claims that Bolanos's testimony was the sole source of evidence of defendant's intent to kill, and that Bolanos's testimony in this regard went uncorroborated. (*Ante*, at p. 782.) By parity of reasoning we find the instant claim to be without merit. (Cf. *People* v. *McDonald* (1984) 37 Cal.3d 351, 378 [208 Cal.Rptr. 236, 690 P.2d 709, 46 A.L.R.4th 1011] [construing § 190.4 in the context of double jeopardy principles];

People v. *Mattson* (1984) 37 Cal.3d 85, 93-94 [207 Cal.Rptr. 278, 688 P.2d 887] [construing § 190.4 in the context of the corpus delicti requirement].)

II. PENALTY PHASE

A. FACTS

Evidence in Aggravation

At the penalty phase the prosecutor introduced evidence of (1) defendant's acquisition of a handgun in early 1979; (2) defendant's carrying the gun for protection during the same time period; (3) his April 1979 conviction as an accessory to voluntary manslaughter; (4) a domestic aggravated assault and battery during the month preceding McConnell's murder; (5) an altercation occurring while defendant was a ward in a county youth facility; and (6) autopsy photographs depicting the nature and extent of McConnell's fatal injuries.

Acquisition of the Handgun

In early 1979, William Cartwright managed a motel in Ontario, California, and was casually acquainted with defendant. He testified regarding an occasion when one "Rudy" met

defendant at the motel and attempted to sell him a .32 caliber automatic handgun which he had acquired in a burglary. Rudy handed the loaded weapon to defendant and asked if he wanted to buy it. Defendant cocked the trigger, pointed it at Rudy and replied: "I've got it now. Why buy it?" Rudy left the premises and defendant retained the weapon.

Evidence of Defendant's Carrying the Gun for Protection

Steven Cartwright testified he was acquainted with defendant in February 1979. He recalled a discussion with defendant who alluded to the fact that some people were "upset" with him. As defendant said this he indicated he had a gun in his belt, slapped his side, and stated he was not concerned as he had all the protection he needed.

Prior Conviction as an Accessory to Voluntary Manslaughter

The prosecution and defense stipulated that on April 16, 1979, in San Bernardino County Municipal Court, defendant entered a plea of no contest to a charge of being an accessory after the fact to voluntary manslaughter (§§ 32, 192, subd. (1)), a felony, and was thereafter sentenced after preparation of a probation report.

Altercation in Youth Facility

In May 1979, defendant was a ward under the supervision of group counselor Ron Cutler. Cutler testified regarding an incident when defendant was observed swinging a chair and about to hit another ward. Cutler was able to knock the chair out of defendant's hands in mid-air before he could strike the other youth with it.

Domestic Aggravated Assault and Battery

In February 1981, defendant, Barbara Murillo (then four months pregnant with defendant's second child), and their

two-year-old daughter were living in an apartment in Lodi rented for them by Murillo's parents. Murillo testified for the People regarding an incident that occurred when Bolanos, Cobarrubio, and others were visiting at the apartment. Murillo and defendant got into an argument which escalated into an altercation. Murillo grabbed a "file" for protection and attempted to phone the police. Defendant cut the telephone cord with his knife. Murillo tried to get out of the apartment. Defendant pushed her and hit her on the head; at one point causing her to drop their infant daughter. He shoved Murillo to the ground and choked her; others present managed to temporarily thwart the attack. Murillo broke out a window and tried to escape through it. Defendant, with the assistance of another male, caught up with and dragged or carried her back into the apartment. A neighbor finally summoned the police who arrived as defendant was leaving the premises.

Evidence in Mitigation

Defendant was one month shy of age 20 at the time of McConnell's murder. His mother testified that her marriage to his father was an unhappy one. He was an alcoholic prone to violence and would beat her; breaking her arm on one occasion, stabbing her in another incident. Defendant was 10 years old when the marriage broke up. Mrs. Belmontes remarried; she testified defendant's stepfather was strict and defendant became difficult to control when the second marriage ended after five years. Defendant had not lived with his mother since being committed to the California Youth Authority in 1979. At the time of trial defendant had a younger brother and sister. Ms. Belmontes characterized defendant's relationship with his sister as "very close."

Defendant's grandfather testified that he and his wife were close to defendant, who attended his grandmother's funeral in 1978. He confirmed that defendant's natural father drank to excess and beat his daughter (defendant's mother). The grandfather had no contact with defendant after his release from the Youth Authority.

Robert Martinez, age 24, testified on defendant's behalf. They were close friends during their early teens and usually spent their time working on Martinez's "low rider" automobile, smoking marijuana and drinking beer, and "hanging around" a car club. Defendant was "best man" at Martinez's wedding. Martinez felt defendant was not a violent person. He and his wife had no contact with defendant after his one visit with them shortly after his release from the Youth Authority.

Martinez's wife Darlene testified she considered defendant a close friend. She was a born-again Christian; when defendant visited with them after his release from the Youth Authority he had advised her that he too was a born-again Christian. He also mentioned his struggling relationship with Murillo and expressed concern that she was not a Christian.

Reverend Dale Barrett, chaplain at the California Youth Authority's Pine Grove Facility, knew defendant from his participation in the "M-2" program, under which a member-family of a local church would be matched with a ward, who in turn would be permitted to visit with the family at specified times. Defendant was matched with Beverly and Fred Haro and participated in the program for about a year. Defendant was baptized during his stay in the Youth Authority. Reverend Barrett felt that unlike the many wards who stayed in the program only to get out of camp and manipulate favors from the sponsoring families, defendant had not "conned" them. He testified that although he personally believed in the death penalty as a deterrent to premeditated murders, he did not feel defendant deserved to die because he was a salvageable person with extenuating circumstances in his life. Although his knowledge of defendant's crimes was concededly limited, it was his understanding that they had not been conclusively determined as premeditated.

The Haros testified they were members of Reverend Barrett's church. Through participation in the "M-2" program defendant had spent Wednesday evenings and weekends with them over a

period of time. The Haros also sponsored other wards whom they treated as their own sons. They felt they had a good relationship with defendant, who on occasion had attended church with them. They felt defendant had been a good influence on their own teenage son. Fred Haro testified he was "strongly for the death penalty" but believed defendant was innocent of the charges and thus did not deserve to die. Beverly Haro felt Barbara Murillo was the primary negative factor in defendant's life.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and director of the "M-2" program, helped place defendant in a halfway house in Oakland upon his release from the Youth Authority. He was aware that defendant stayed in that facility only two weeks before moving to the Lodi area to take a job with the forest service. Defendant returned to Preston on a few occasions after his release and spoke to wards about what life was like "on the outside." Reverend Miller believed defendant would be good at talking with other prisoners if he were committed to prison for a life term.

Defendant testified in his own behalf. He had a poor relationship with his father who would come home drunk and hit his mother. He did not like school and stopped attending in the ninth grade. Although his youth was "pretty hard," defendant twice stressed he did not want to "use it as a crutch."

Defendant was in the custody of the Youth Authority from early 1979 through his release in November 1980. He worked on the fire crew at the Pine Grove Camp for one year. He admitted he initially entered the "M-2" program as a way to get out of camp. Thereafter, he studied the Bible with the Haros and in time started serving the Lord. He was paroled from the Youth Authority after serving his maximum sentence. He stayed at the halfway house in Oakland for two weeks and then went to Southern California for a short period, returning with Murillo to the Lodi area to take a job with the forest service. Things did not go well for defendant while he was living with Murillo. He "couldn't deal with" his religious commitment and "started going

back to [his] old ways," in part due to "pressure on the streets." At the time of trial, defendant had not abandoned his religious beliefs but felt he was no longer "dedicated one hundred percent" to his religious commitment.

At the conclusion of the evidentiary stage, the court permitted defendant to personally address the jury in his own behalf during closing arguments.

B. PENALTY PHASE ISSUES

1. *Use of Peremptory Challenges to Exclude Prospective Jurors Expressing Reservations About the Death Penalty*

Defendant contends that the prosecutor improperly exercised peremptory challenges to excuse four prospective jurors who — although not excusable for cause under *Witherspoon* v. *Illinois* (1968) 391 U.S. 510 [20 L.Ed.2d 776, 88 S.Ct. 1770] — nevertheless expressed some reservations about the death penalty. We have rejected the argument in *People* v. *Turner* (1984) 37 Cal.3d 302 [208 Cal.Rptr. 196, 690 P.2d 669], wherein we found "no ... constitutional infirmity in permitting peremptory challenges by both sides on the basis of specific juror attitudes on the death penalty." (*Id.*, at p. 315.)

2. *Instructions on Sympathy and General Character and Background Evidence*

(31) Defendant argues that the jury was misinstructed on the proper role of sympathy and general character and background evidence in the penalty phase.

In *People* v. *Melton* (1988) 44 Cal.3d 713, 759 [244 Cal.Rptr. 867, 750 P.2d 741], we explained: "We previously reversed several death judgments where (1) a 'no-sympathy' instruction was given *at the penalty phase*, (2) the jury also received, without elaboration, an instruction (the 'unadorned factor (k)

instruction') to consider mitigating evidence which 'extenuates the *gravity of the [capital] crime*' (§ 190.3, subd. (k); former § 190.3, subd. (j); CALJIC, former No. 8.84.1, subd. (k), italics added), and (3) defendant introduced substantial evidence about his *general character and background*. In such cases, we reasoned, there was intolerable ambiguity about whether the jury understood its power and duty under the Eighth Amendment to consider all 'sympathetic' evidence defendant proffered on behalf of a penalty less than death. (E.g., *People* v. *Brown* (1985) 40 Cal.3d 512, 537-538 [220 Cal.Rptr. 637, 709 P.2d 440]; *People* v. *Lanphear* (1984) 36 Cal.3d 163, 166-169 [203 Cal.Rptr. 122, 680 P.2d 1081]; *People* v. *Easley* (1983) 34 Cal.3d 858, 878-879 [196 Cal.Rptr. 309, 671 P.2d 813]; see *Eddings* v. *Oklahoma* (1982) 455 U.S. 104, 117 [71 L.Ed.2d 1, 12, 102 S.Ct. 869], and conc. opn. of O'Connor, J., at p. 119.)[19]

"The United States Supreme Court granted certiorari in *People* v. *Brown, supra*, 40 Cal.3d 512, to consider the constitutional effect of a 'no-sympathy' admonition on penalty deliberations in a capital case. The court has concluded that a warning to ignore 'mere' sympathy does not offend the Eighth Amendment in and of itself. However, where the jury was cautioned against sympathy and also received an unadorned factor (k) instruction, the penalty-phase instructions and arguments must be examined as a whole to determine whether the jury was 'adequately informed ... of its responsibility to consider all of the mitigating evidence introduced by the [defendant] ....' (*California* v. *Brown* (1987) 479 U.S. 538, 546 [93 L.Ed.2d 934, 943, 107 S.Ct. 837] [conc. opn. of O'Connor, J.].)"

---

19. In a footnote we explained: "CALJIC No. 8.84.1 has since been revised to make clear, as we directed in Easley, that mitigating evidence to be considered under 'factor (k)' includes 'any ... "aspect of [the] defendant's character or record ... that the defendant proffers as a basis for a sentence less than death." ...' (P. 878, fn. 10; see CALJIC No. 8.84.1, subd. (k) (4th ed. 1984 rev.).)"

We conclude the jury here was adequately informed of the full nature of its responsibility to consider sympathy and general character and background evidence.

First, the standardized "no-sympathy" instruction was not given in this case. At the People's request, a modified version of CALJIC No. 1.00 was given. The words "sympathy" and "passion" were omitted from the first sentence of the instruction, which as modified read: "You are instructed that as jurors you must not be swayed by mere sentiment, conjecture, [] ... prejudice, public opinion, or public feeling." (Contrast CALJIC No. 1.00.) The following charge was then read after the first modified sentence: "Also, you must not be influenced by sympathy or passion except as those feelings properly arise out of your consideration of the proven factors in aggravation and mitigation." Thus the trial judge and prosecutor here presciently fashioned an instruction which satisfies the directives announced by the United States Supreme Court nearly five years later in *California* v. *Brown* (1987) 479 U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837].[20/]

Next, although the jury did receive an instruction in the literal terms of factor (k), it was also instructed that only *statutory* aggravating factors could be properly considered (§ 190.3), immediately followed by a special instruction which stated: "the mitigating circumstances which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes. You should pay

---

20. Defendant contends that the modified instruction was itself incorrect and misleading because sympathy for the defendant cannot "properly arise" out of an aggravating factor. In so arguing, however, he interprets the proper role of "sympathy" at the penalty phase too narrowly. The United States Supreme Court has implicitly recognized that a penalty phase juror need not "ignore emotional responses" which are "rooted in the aggravating and militating evidence introduced during the penalty phase." (*California* v. *Brown* (1987) 479 U.S. 538, 542 [93 L.Ed.2d 934, 940, 107 S.Ct. 837].)

careful attention to each of these factors. Any one of them, standing alone, may support a decision that death is not the appropriate punishment in this case [italics added]."

The prosecutor's argument reinforces our conclusion that, as instructed, the jury must have fully understood its obligation to weigh all of defendant's mitigating evidence. He told the jurors: "With respect to the instructions ... in this listing of aggravating and mitigating circumstances which you are to weigh one against the other, there is a proper place for sympathy and passion. [¶] ... At this stage of the proceedings you are not only the judges of the facts, you decide how much they weigh. And in weighing them, it is proper to take into account factors that impinge upon anger and sympathy and so forth." He went on to explain: "Let me tell you what that doesn't mean, if I may. Your regard for Steacy McConnell's family, mean no one [sic], no one can deny sympathy for them, no one. But that is not the kind of sympathy the instruction tells you to consider. It says as sympathy or passion naturally arises or properly arises from the factors in aggravation and mitigation. ... [¶] ... it is different from the guilt phase when sympathy was to play no part at all."

In discussing the scope of "factor (k)" evidence in his argument, the prosecutor did at first express some doubt as to whether evidence of defendant's prior religious experience "really fits in there." However, he quickly concluded: "I think it appears to be a proper subject of consideration." He then argued his position that defendant's religious experience *prior to the murder* was not a strong mitigating factor under all the circumstances. He suggested the jury should "weigh" defendant's "religious awakening" as "a basis for determining penalty," particularly in the context of Reverend Miller's opinion that, if given a life term, defendant would be good at talking and working with other prisoners. The prosecutor concluded in this vein: "I think that value to the community is something that you have to weigh in. There's something to that."

Finally, in summing up all the penalty phase evidence, the

prosecutor candidly stated: "The prior criminal activity has been described to you on the stand isn't great, you know. [¶] All right. So these things, they really, they don't show that the defendant is such a horrible person that the ultimate penalty must be imposed." The prosecutor went so far as to suggest that the aggravating factors — other than those circumstances directly related to the murder — came to a "draw." The thrust of his penalty phase argument was that the aggravated circumstances of the crime itself were the major factors outweighing the mitigating evidence and militating in favor of the death penalty.

Viewing the instructions and arguments as a whole, we conclude there exists "no legitimate basis" for believing the jury was misled regarding its sentencing responsibilities. (*California* v. *Brown, supra*, 479 U.S. at p. 546 [93 L.Ed.2d at p. 943, 107 S.Ct. at p. 842] [conc. opn. of O'Connor, J.].)

3. *"Mandatory" Nature of 1978 Death Penalty Law*

Defendant attacks the instruction which charged the jury that it "shall" impose death if it finds that aggravating "outweigh" mitigating circumstances. (CALJIC, former No. 8.84.2; see § 190.3.)

We recently summarized the relevant principles in *People* v. *Gates, supra*, 43 Cal.3d at pages 1203-1204 as follows: "In *People* v. *Brown* (1985) 40 Cal.3d 512, 538-545 (revd. on other grounds *California* v. *Brown* (1987) U.S. 538 [93 L.Ed.2d 934, 107 S.Ct. 837]), we concluded that the directive of section 190.3 that the trier of fact 'shall impose a sentence of death' if it 'concluded that the aggravating circumstances outweigh the mitigating circumstances,' did not impermissibly restrict the jury's constitutional sentencing discretion. We rejected the defendant's proffered mechanistic construction of the words 'outweigh' and 'shall' in favor of one which directed the jury to weigh the various factors and determine under the relevant evidence which penalty is appropriate in a particular case. We noted, however, that the statutory language — particularly the

words 'shall impose' — left room for some confusion about the jury's role and therefore directed courts in the future to instruct on the scope of the jury's discretion. We further stated that each prior case 'must be examined on its own merits to determine whether, in context, the sentencer may have been misled to defendant's prejudice about the scope of its sentencing discretion under the 1978 law.' (*Id.*, at p. 544, fn. 17.)

"Our concerns in *Brown* were essentially two: The first was that the jury might be confused about the nature of the weighing process, that it is not a mere mechanical counting of factors on each side of an imaginary scale but rather a mental balancing process. Our second concern was that use of the word 'shall' might mislead the jury as to the substance of the ultimate determination it was called upon to make. In *Brown*, we concluded that the statutory language 'should not be understood to require any juror to vote for the death penalty unless, upon completion of the "weighing" process, he decides that death is the appropriate penalty under all the circumstances. Thus the jury, by weighing the various factors, simply determines under the relevant evidence which penalty is appropriate in the particular case.' (40 Cal.3d at p. 541.)" (See also *People* v. *Allen* (1986) 42 Cal.3d 1222, 1276-1277 [232 Cal.Rptr. 849, 729 P.2d 115].)

We have examined the instructions and arguments in this regard and determine that, overall, the jury was adequately informed of the full nature of its sentencing responsibility. (*People* v. *Brown, supra*, 40 Cal.3d at p. 544, fn. 17.) While it heard the "shall/outweigh" instruction, the jury also received additional instructions further defining its proper sentencing function. It was told that aggravating factors were strictly limited by statute and must be proved beyond a reasonable doubt. As already noted, it was further told that the mitigating factors enumerated in the statute were merely "examples" of mitigating circumstances which could be considered, and that any one mitigating circumstance *standing alone* could support a decision that death is not the appropriate penalty in this case.

Regarding counsel's arguments, here, as in *Allen*, "the prosecutor not once suggested the weighing process was a mechanical function. Indeed, he effectively told the jury just the opposite, and attempted to give guidelines that could be applied by each individual juror to first value and then weigh the respective factors." (*People* v. *Allen, supra*, 42 Cal.3d at p. 1277.) He told the jury they must "weigh" aggravating against mitigating circumstances in determining penalty, and explained: "[Y]ou decide how much they weigh." He used the terms "weigh," "simple weighing," and "balance" several times in his discussions of each of the individual aggravating and mitigating circumstances. He urged the jury to assess defendant's prior religious experience and attempt to determine "how much does that weigh." He stated that defendant's potential value to the community or prison population should he be sentenced to life imprisonment was "something you have to weigh in." He stressed to the jurors that defendant's obvious intelligence was "a factor to be weighed," as was any lingering doubt about his guilt of McConnell's murder.

As already noted, the prosecutor suggested that the aggravating circumstances — exclusive of those directly related to the brutal murder — did not in and of themselves warrant the death penalty. Our review of the instructions and arguments as a whole compels rejection of defendant's assertion that the giving of the "shall/weigh" instruction "misled the jury into abandoning its role as conscience of the community and assuming a role more akin to that of a penological account," "governed by the type of 'arithmetical formula' condemned in [*Brown, supra*, 40 Cal.3d 512]."

Lastly, defendant refers us specifically to one juror's (Juror Hearn's) inquiry about "the listing" of aggravating and mitigating circumstances. She asked, "That was the listing, right?" and then inquired: "Of those certain factors we were to decide one or the other and then balance the sheet?" The court responded: "That is right. It is a balancing process."

At oral argument, appellate counsel asserted that these inquiries reflect that "Mrs. Hearn was seeking judicial confirmation of her restrictive view of the scope of factors which should go into the penalty phase deliberations." We cannot agree with counsel's conclusion that the juror's mere reference to the statutory "listing" of aggravating and mitigating factors — as a predicate to her question about the balancing process — reflected her "restrictive" view of factor (k) evidence. Nor can we agree that "the court compounded the error in its response, 'That was the listing, yes.'" Counsel suggests that the "constitutionally correct" answer would have been: "That list is exhausting [*sic*] as to aggravating factors, but it is only illustrative as to mitigating factors." That is precisely what the court's modified instructions on mitigating evidence conveyed. (*Ante*, at pp. 800-801.)

Defendant also infers from Juror Hearn's use of the term "balance the sheet" in her inquiry that she was following the type of "arithmetical formula" which this court condemned in *Brown, supra*, 40 Cal.3d 512. But viewed in the overall context of the instructions and arguments, neither the juror's question nor the court's response supports an inference of reversible *Brown* error. Defendant misreads our statement in *Brown* — to the effect that in weighing mitigating against aggravating circumstances "the balance is not between good and bad but between life and death" (*id.* at p. 542, fn. 13) — as a blanket condemnation of use of the term "balancing" to describe the "weighing" process. Elsewhere in *Brown* we characterized the term "weighing" as "connot[ing] a mental balancing process. ..." (*Id.*, at p. 541.) There is nothing inherently misleading in use of the term "balancing" to describe the weighing process — where the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities.[21]

---

21. The verb "balance" is defined thusly: "1. To weigh in a balance; to estimate the weight of; to ponder; 2. To weigh (two things) by each other; to compare in relative force, importance, value, etc. ..." (Webster's New Internat. Dict. (2d ed. 1936) at p. 206.)

4. *Requiring Appropriateness of Death Penalty to Be Shown Beyond a Reasonable Doubt*

Defendant asserts that the 1978 death penalty law is unconstitutional in that it fails to require the jury to find *beyond a reasonable doubt* (1) that the aggravating factors outweigh those in mitigation, and (2) that death is the appropriate penalty. We have recently rejected these identical arguments. (*People* v. *Melton, supra*, 44 Cal.3d at pp. 762-763; *People* v. *Rodriguez* (1986) 42 Cal.3d 730, 777-779 [230 Cal.Rptr. 667, 726 P.2d 113]; *People* v. *Allen, supra*, 42 Cal.3d at p. 1285.)

5. *Specific Findings on Aggravating and Mitigating Circumstances at the Penalty Phase*

Defendant argues that the court erred in denying defense counsel's request that the jury be required to make specific findings regarding any aggravating or mitigating factors found to be true. We have recently rejected this argument; written findings disclosing the precise reasons for the jury's penalty verdict are not required. (*People* v. *Rodriguez, supra*, 42 Cal.3d at pp. 777-779; *People* v. *Allen, supra*, 42 Cal.3d at p. 1285; cf. *People v. Frierson* (1979) 25 Cal.3d 142, 178-180 [158 Cal.Rptr. 281, 599 P.2d 587] [1977 death penalty law]; *Harris v. Pulley* (9th Cir. 1982) 692 F.2d 1189, 1195-1196, vacated and remanded on other grounds, *Pulley v. Harris* (1984) 465 U.S. 37 [79 L.Ed.2d 29, 104 S.Ct. 871].)

6. *Age as an Aggravating Factor*

One of the factors to be considered by the penalty phase jury "if relevant" is "[t]he age of the defendant at the time of the crime." (§ 190.3, factor (i).) The prosecutor here told the jury it was for them to determine whether defendant's age was a factor in aggravation or mitigation. He went on to argue: "The defendant may well say I was only 19 when this happened or the attorney may say he was only 19 and when you're young you sometimes you make mistakes, mistakes that you would never

make if you were 29 or 39. And that sort of thing must be taken into account. When you are young, your judgment isn't right or isn't mature or developed. [¶] On the other hand, however, it's common experience that when you're young people are idealistic, altruistic, they believe that anything is possible, that people love one another or that everything is good or all is good for them and that as they age, a cynicism creeps in. Maybe that's too strong a word. A hardening, maybe. And that it doesn't always necessarily mean that you're a better person when you get older. [¶] Going the other way around, it doesn't mean you're a better person when

you're younger, either. [¶] All I'm saying is that I think the age of the defendant goes both ways, really." In further commenting on defendant's own testimony that he was not relying on his difficult childhood to justify his criminal acts, the prosecutor stated: "But he's old enough that he has to take responsibility for his own actions, and he told you that. He can't use that as a crutch. I give him credit for recognizing that."

Defendant asserts that this was improper argument on age as an aggravating factor. Initially, we note that defendant failed to object to the prosecutor's comments or to request an appropriate admonition. Accordingly, to the extent he is arguing "misconduct," he has waived the objection on this ground on appeal. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 788; *People* v. *Allen, supra*, 42 Cal.3d at pp. 1283-1284; *People* v. *Green, supra*, 27 Cal.3d at p. 27.)

We recently stated that "mere chronological age, a factor over which one can exercise no control, should not of itself be deemed an aggravating factor." (*People* v. *Rodriguez, supra*, 42 Cal.3d p. 789.) On the other hand, "mere chronological age of itself should not be deemed a mitigating factor. Age alone is plainly 'a factor over which one can exercise no control.' (*Rodriguez, supra*, at p. 789) .... [¶] In our view, the word 'age' in statutory sentencing factor (i) is used as a metonym for any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice

of penalty. Accordingly, either counsel may argue any such age-related inference in every case." (*People* v. *Lucky* (1988) 45 Cal.3d 259, 302.)

Here the prosecutor in essence argued that defendant's age was a "neutral" factor: "All I'm saying is that I think the age of the defendant goes both ways, really." He did not declare affirmatively that defendant's "mere chronological age" of almost 20 years weighed in favor of the death penalty. (*Rodriguez, supra*, 42 Cal.3d at p. 789.) He remarked that defendant was "old enough that he has to take responsibility for his own actions." Such comment "reasonably may be viewed as merely arguing the inapplicability of a mitigating factor, rather than seeking to penalize defendant by reason of his age." (*People* v. *Ghent, supra*, 43 Cal.3d at p. 775.)

7. *Lack of Remorse as an Aggravating Factor*

Defendant contends that the prosecutor impermissibly argued lack of remorse as an aggravating factor. The prosecutor told the jury: "[Defendant] can't suggest to you he feels remorse, because ladies and gentlemen of the jury, that is the one thing that we have never heard, that he is sorry. As a matter of fact, the only emotion, the only genuine emotion that I saw, and I think you saw, came during his cross-examination on the guilt phase when he expressed anger at Domingo Vasquez for standing and staring in shock instead of picking up the stereo. So there is no remorse. No thought of Steacy."

It is clear that the People may not present evidence in aggravation unless it is relevant to an aggravating circumstance expressly listed in section 190.3 (*People* v. *Boyd* (1985) 38 Cal.3d 762, 771-776 [215 Cal.Rptr. 1, 700 P.2d 782].)

Defendant failed to object to the prosecutor's comments on remorse. Nor did he request a curative admonition. To the extent he is claiming it was "misconduct" to affirmatively argue lack of

remorse as an aggravating factor, he has waived the objection on appeal. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 788; *People* v. *Allen, supra*, 42 Cal.3d at pp. 1283-1284; *People* v. *Green, supra*, 27 Cal.3d at p. 27.)

"[W]e have held that, under a prior death penalty law, the presence or absence of remorse is a factor relevant to the jury's penalty decision. (*People* v. *Coleman* [(1969)] 71 Cal.2d [1159'], at p. 1168 [80 Cal.Rptr. 920, 459 P.2d 248].) The concept of remorse for past offenses as a mitigating factor sometimes warranting less severe punishment or condemnation is universal." (*People* v. *Ghent, supra*, 43 Cal.3d at p. 771.)

Although in *Davenport* we held that "in the future" prosecutors should refrain from arguing the mere absence of a mitigating factor as itself constituting an aggravating circumstance (41 Cal.3d at p. 289), here the prosecutor's reference to defendant's lack of remorse, "as in his comments on age ... did no more than suggest the *inapplicability* of a *mitigating* factor." (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 790; *People* v. *Ghent, supra*, 43 Cal.3d at p. 771.) It was part-and-parcel of his overall argument that each category of defendant's penalty phase evidence (e.g., defendant's "religious beliefs" within the "catchall provision" of factor (k)) was worthy of assignment of only marginal mitigating "weight."

Lastly, even were we to read the prosecutor's closing argument as affirmatively advancing defendant's lack of remorse as an aggravating circumstance, our review of the record convinces us that such remarks could not have affected the jury's penalty verdict. (*People* v. *Ghent, supra* 43 Cal.3d at pp. 775-776.)

8. *Evidence of Other Criminal Conduct*

Defendant argues that the admission of prior *unadjudicated* criminal conduct at the penalty phase violated his state and federal due process rights. The claim lacks merit. Section 190.3 constitutionally permits introduction at the penalty phase of

evidence of prior unadjudicated criminal conduct as relevant to and bearing upon the character and record of the individual offender. "As the plurality opinion in *Woodson* v. *North Carolina* (1976) 428 U.S. 280, 304 [49 L.Ed.2d 944, 961, 96 S.Ct. 2978], emphasized: '... [I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment [citation] *requires consideration of the character and record of the individual offender* and the circumstances of the particular offense *as a constitutionally indispensable part of the process of inflicting the penalty of death*.' (Italics added.)" (*People* v. *Robertson* (1982) 33 Cal.3d 21, 58 [188 Cal.Rptr. 77, 655 P.2d 279], first italics added; see *Eddings* v. *Oklahoma, supra*, 455 U.S. 104, 111-112 [71 L.Ed.2d 1, 8-9]; *Lockett* v. *Ohio* (1978) 438 U.S. 586, 604-605 [57 L.Ed.2d 973, 989-990, 98 S.Ct. 2954] (plur. opn.); *People* v. *Brown, supra*, 40 Cal.3d at p. 539.)

Defendant further contends that none of his prior instances of unadjudicated criminal conduct constituted a cognizable criminal offense involving force or violence.

Insofar as section 190.3 contemplates consideration of defendant's criminal history (see factors (b), (c)), such evidence "must be limited to ... conduct that demonstrates the commission of an actual crime, specifically, the violation of a penal statute. ..." (*People* v. *Phillips*, (1985) 41 Cal.3d 29, 72; see also *Boyd, supra*, 38 Cal.3d at pp. 776-778.) We have also made clear the distinction between "criminal activity" and "convictions" for purposes of section 190.3. "The plain meaning of [factors] (b) and (c) of section 190.3 is that the jury must consider any *violent* criminal activity by the defendant, *whether or not it led to prosecution and conviction* [fn. omitted], and any 'prior *felony conviction*' (italics added), whether the underlying offense was violent or nonviolent. (See ... *Boyd* (1985) 38 Cal.3d 762, 774, 776.) ...." (*People* v. *Balderas* (1985) 41 Cal.3d 144, 201 [222 Cal.Rptr. 184, 711 P.2d 480], second italics added.)

The prosecutor was entitled to present testimonial evidence of violent "criminal activity" with which defendant had never been

charged. (*Balderas, supra*, 41 Cal.3d at pp. 201, 205; see also *People* v. *Robertson*, *supra*, 33 Cal.3d at p. 53.) Defendant's domestic altercation with Murillo; his pointing a loaded gun at "Rudy" in order to appropriate the weapon; and his apparently unprovoked act of swinging a chair at another ward at a youth facility, were all violent criminal offenses (aggravated assault, battery, assault with a deadly weapon, and simple assault) and thus properly argued as aggravating circumstances.

It was error, however, to admit evidence that defendant, while in the presence of an acquaintance, once slapped his side indicating he had a handgun in his waistband, while stating he had "all the protection he needed." Although such is arguably an "express or implied threat to use force or violence" (§ 190.3), it was not directed at a particular victim or victims, and did not amount to criminal conduct in violation of a penal statute. (*People* v. *Phillips, supra*, 41 Cal.3d at p. 72.) The Attorney General concedes as much.

We find the error nonprejudicial. This case was tried before *Phillips, supra,* 41 Cal.3d 29, and *Balderas, supra*, 41 Cal.3d 144, were decided. The jury was instructed on the requirement that "other crimes" be proved beyond a reasonable doubt. (*People* v. *Robertson, supra*, 33 Cal.3d at p. 55.) The properly admitted aggravating evidence in this case — in particular, the circumstances of the crime (§ 190.3, factor (a)) — was simply overwhelming. It would require capricious speculation for us to conclude that the erroneous admission of evidence of the "gun slapping" incident affected the penalty verdict.

Lastly, defendant argues that evidence of his 1979 felony conviction upon a plea of "no contest" to being an accessory to voluntary manslaughter should have been excluded. He asserts that such a plea "demonstrates only that a defendant is willing to accept the punishment prescribed for a particular offense," and "does not establish the truth of the facts implied or contained in the charge." The claim is specious. Section 1016 provides, in pertinent part, that: "The legal effect of [a nolo contendere] plea,

to a crime punishable as a felony, shall be the same as that of a plea of guilty for all purposes." Moreover, defendant *stipulated* to introduction of this evidence. Evidence of the prior felony conviction was properly admitted. (§ 190.3, factor (c).)

9. *Juror Misconduct*

During a break in the penalty phase, defense counsel advised the court that he had observed a juror, Mr. Meyers, talking to Mr. McConnell, a member of the victim's family. Counsel had also seen one of the four alternate jurors, Ms. Romans, conversing with the victim's grandmother. A hearing was conducted in chambers on the matter. Juror Meyers explained that he was "discussing motorcycles" with Mr. McConnell. The conversation was "purely social;" nothing had been said about defendant or the trial proceedings. Defense counsel asked Meyers: "[D]o you think there is anything about the fact that you have had a chance to be exposed to Mr. McConnell in this social vein or whatever you would have some rapport or feeling with him that would prejudice or be a concern to me or Mr. Belmontes?" Meyers responded, "No." He expressed a clear understanding of the court's concerns. When asked, "Supposing you were to make a decision he [Mr. McConnell] didn't agree with, mainly life in prison, do you feel you could look him in the eye?" Meyers responded, "Sure." He then apologized for causing a problem.

Alternate Juror Romans was similarly questioned. She revealed she had talked briefly with the victim's grandmother, who was hard of hearing, on a "personal" level; "just wondering how she was, you know, holding up or something like that." Since Romans ultimately never sat on defendant's jury, there is no concern that her contact was prejudicial.

The prosecutor informed the court that he had instructed the members of the victim's family "not to talk to the prospective jurors, although that was some time ago." He advised the court that he would do so again. The court denied counsel's motion for a mistrial, stating on the record that having made the relevant

inquiries it found "no taint." Back in the full jury's presence, the court admonished the jurors not to talk to any members of the victim's family, adding: "And I would admonish the McConnell family and the Steacy family also, please, whether you want you to talk about the stars or the tulips or the roses, I don't even want to do that."

Defendant argues that a mistrial should have been granted — or in the alternative — Juror Meyers replaced with an alternate juror other than Ms. Romans. We have held that jury misconduct raises a presumption of prejudice; unless the prosecution rebuts that presumption by proof that no prejudice actually resulted, the defendant is entitled to a new trial. (*People* v. *Pierce* (1979) 24 Cal.3d 199, 207 [155 Cal.Rptr. 657, 595 P.2d 91]; *People* v. *Honeycutt* (1977) 20 Cal.3d 150, 156 [141 Cal.Rptr. 698, 570 P.2d 1050].) Our review of the record satisfies us that the presumption was rebutted and no prejudice actually resulted.

10. *Admissibility of Codefendants' Plea Dispositions as Mitigating Evidence*

Defendant argues that the trial court erred in excluding evidence of the pleas and negotiated dispositions of his accomplices at the penalty phase.[22/] We disagree. Evidence of Bolanos's and Vasquez's negotiated plea dispositions — *separate and apart from evidence of their complicity and degree of involvement in the instant offenses* — bore no relevance to the jury's properly guided function at the penalty phase. "'[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of *the character*

---

22. The jury of course learned at the guilt phase — for purposes of impeachment of Bolanos — that he had pled guilty to second degree burglary and was granted immunity from prosecution for McConnell's murder in exchange for his testimony at defendant's trial. Evidence of Vasquez's guilty plea to second degree murder was not admitted at the guilt phase. (*Ante*, fn. 9, at p. 779.)

and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death (italics added).'" (*Lockett* v. *Ohio, supra*, 438 U.S. at p. 604 [57 L.Ed.2d at p. 989.], quoting *Woodson, supra*, 428 U.S. 280.)

The United States Supreme Court in *Lockett* stated: "We recognize that, in noncapital cases, the established practice of individualized sentences rests not on constitutional commands, but on public policy enacted into statutes. The considerations that account for the wide acceptance of individualization of sentences in noncapital cases surely cannot be thought less important in capital cases. Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. *The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.* A variety of flexible techniques — probation, parole, work furloughs, to name a few — and various post-conviction remedies may be available to modify an initial sentence of confinement in noncapital cases. The nonavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence [fn. omitted, italics added]." (*Lockett* v. *Ohio, supra*, 438 U.S. at pp. 604-605 [57 L.Ed.2d at p. 990], italics added; see *People* v. *Allen, supra*, 42 Cal.3d at pp. 1286-1287.)

In *Coulter* v. *State* (Ala.Crim.App.1982) 438 So.2d 336, 345-346, the Alabama Court of Criminal Appeals, "[a]pplying the principles of *Lockett*, in light of *Eddings* [*Eddings* v. *Oklahoma* (1982) 455 U.S. 104 [71 L.Ed.2d 1, 102 S.Ct. 869]] and *Enmund* [*Enmund* v. *Florida* (1982) 458 U.S. 782 [73 L.Ed.2d 1140, 102 S.Ct. 3368]] ...," reasoned that "an alleged accomplice's sentence is a product of the aggravating and mitigating circumstances applicable to the alleged accomplice. *In the sentencing phase of the trial, the fact that an alleged*

accomplice did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be as an aggravating circumstance against him. Simply put, an alleged accomplice's sentence has no bearing on the defendant's character or record and it is not a circumstance of the offense (italics added)." (See also *Brogie* v. *State* (Okla. Crim. 1985) 695 P.2d 538, 546-547 [relying on *Coulter*].)

In *State* v. *Williams* (1982) 305 N.C. 656 [292 S.E.2d 243], certiorari denied 459 U.S. 1056 [74 L.Ed.2d 622, 103 S.Ct. 474],

defendant argued that the trial court had erred in refusing to submit to the jury as a circumstance in mitigation evidence that his two accomplices had negotiated plea bargains with maximum ten-year prison terms. In rejecting the contention, the North Carolina Supreme Court wrote: "The fact that the defendant's accomplices received a lesser sentence is not an extenuating circumstance. It does not reduce the moral culpability of the killing nor make it less deserving of the penalty of death than other first-degree murders. [Citation.] The accomplices' punishment is not an aspect of the defendant's character or record nor a mitigating circumstance of the particular offense. (See *Lockett* v. *Ohio* [, *supra*,] 438 U.S. 586.) It bears no relevance to these factors, and thus there was no error in the judge's refusal to submit it to the jury." (*Id.*, at pp. 261-262.)

The Fifth Circuit Court of Appeals has likewise rejected the identical contention, concluding that nothing in the United States Supreme Court's recent decision in *Skipper* v. *South Carolina* (1986) 476 U.S. 1 [90 L.Ed.2d 1, 106 S.Ct. 1669], or *Hitchcock* v. *Dugger* (1987) 481 U.S. 393 [95 L.Ed.2d 347, 107 S.Ct. 1821], lends any support to the argument that a codefendant's sentence disposition is relevant to a capital defendant's character, record, or the circumstances of his offense, as relevancy is defined in *Lockett, supra*, 438 U.S. 586. (*Brodgon* v. *Butler* (5th Cir. 1987) 824 F.2d 338, 343; *Brogdon* v. *Blackburn* (5th Cir. 1986) 790 F.2d 1164, 1169.)

Although we recognize that several Florida decisions have reached a contrary conclusion (see, e.g., *Brookings* v. *State* (Fla. 1986) 495 So.2d 135, 143; *Messer* v. *State* (Fla. 1976) 330 So.2d 137, 141-142), we find the rationale of *Coulter* v. *State, supra*, 438 So.2d 336, *State* v. *Williams supra*, 292 S.E.2d 243, and the *Brogdon* decisions persuasive and conclude that their holdings should be applied here. At the guilt phase, defendant's jury was fully apprised of the roles and degree of participation Bolanos and Vasquez each had in the burglary and murder. The jury's verdicts and special findings, supported by the weight of evidence, establish that defendant was found beyond a reasonable doubt to have personally, intentionally killed McConnell prior to Vasquez's entry into the victim's house. Bolanos never entered the house. As a factual matter, defendant's accomplices clearly did not share his level of involvement and participation in the murder. On these facts, the holdings of *Woodson, supra*, 428 U.S. 280, *Lockett, supra*, 438 U.S. 586, *Eddings, supra*, 455 U.S. 104, and *Enmund, supra*, 458 U.S. 782 compel the conclusion that Bolanos's and Vasquez's individually negotiated dispositions were not "constitutionally relevant" to defendant's penalty determination. (See *People* v. *Allen, supra*, 42 Cal.3d at p. 1287; *People* v. *Brown, supra*, 40 Cal.3d at p. 540.)

11. *Juror Inquiries During Penalty Phase Deliberations*

After less than three hours of deliberation, the jury foreman presented the court with a note inquiring (1) "what happens if we can't agree?" (2) "can the majority rule on life imprisonment?" and (3) "how long do we deliberate today and what happens if we don't reach a decision by then?" The court responded by rereading CALJIC No. 8.84.2 — as modified at defense counsel's request — which in essence told the jury they had to choose between life imprisonment without parole and death, and that any verdict had to be unanimous. The concluding sentence of the modified instruction read: "In order to make a determination as to penalty, all twelve jurors must agree, *if you can*."

At this point a juror asked: "If we can't, Judge, what happens?" The trial judge replied that he knew what would happen but could not elaborate upon it. Defense counsel requested the court to inquire of the jury whether it would be able to reach a verdict, and the inquiry was posited. One juror responded: "Not the way it is going." The foreman replied: "That is tough, yes." The court then asked the foreman: "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" The foreman replied: "I believe there is a possibility." Another juror added: "We did need more time." Finally, a different juror asked: "[W]ould this be an either/or situation? ..." — to which the court replied: "It is not that. ... If you can make that either/or decision. If you cannot, then I will discharge you."

Under the 1977 death penalty legislation (former § 190.4 subd. (b)), if a jury was unable to agree on penalty the court would impose a sentence of life without parole. Under the current death penalty law applicable here, if the jury is unable to agree on penalty the court must impanel a new jury; if the second jury becomes deadlocked, the court in its discretion may impanel a third jury or impose a sentence of life imprisonment without parole. (§ 190.4, subd. (b).)[23]

Defendant argues that the trial court's failure to "forthrightly" answer the juror's inquiry was error. He contends that the only "forthright" reply would have been an instruction in the full-blown language of section 190.4, subdivision (b); i.e., informing the jury of the statutorily mandated procedures and possibility of subsequent retrials in the event of a deadlock.

We conclude that such an instruction under the 1978 death penalty law would have the potential for unduly confusing and misguiding the jury in their proper role and function in the

---

23. Of course the People may elect to forego a second or third penalty phase retrial and assent to imposition of a sentence of life imprisonment without the possibility of parole.

penalty determination process. Penalty phase juries are presently instructed that their proper task is to decide between a sentence of death and life without the possibility of parole. Any further instruction along the lines suggested herein could well serve to lessen or diminish that obligation in the jurors' eyes. (See *People* v. *Kimble* (1988) 44 Cal.3d 480, 511-516 [244 Cal.Rptr. 148, 749 P.2d 803] [1977 death penalty law]; cf. *People* v. *Gainer* (1977) 19 Cal.3d 835, 852 [139 Cal.Rptr. 861, 566 P.2d 997, 97 A.L.R.3d 73] [wherein we held erroneous any instruction which states or implies that a jury's failure to reach a verdict will necessarily require retrial].)[24]

In any case, the trial judge here responded to the jurors' questions in a commendably forthright fashion. When initially faced with the inquiries, he sought to avoid any confusion or unseen prejudice by rereading the pertinent CALJIC instruction. But thereafter, when one juror asked the very pointed question: "Is it either/or?" [i.e., automatic imposition of one or the other penalty in the event of a deadlock] — the court prudently avoided misinforming and misleading the jury by stating: "If you can make that either/or decision. If you cannot, then I will discharge you." Defendant can claim no prejudice from such a limited disclosure. It bore no resemblance to the often criticized "*Allen*-type instruction" designed to extract a verdict from a deadlocked jury by admonishing the minority jurors to rethink their positions in light of the majority's views. (*Allen* v. *United States* (1896) 164 U.S. 492, 501 [41 L.Ed. 528, 530-531, 17 S.Ct. 154].)

The jurors deliberated an additional one and a half days after receiving reinstruction and the court's responses to their inquiries

---

24. Defendant speculates that without such instruction, a juror may believe that deadlock at the penalty phase will nullify the guilty verdicts returned in the guilt phase. However, in light of the instructions which explain the bifurcated nature of capital trials and the jury's function at the penalty phase, the possibility of such a mistaken inference being drawn is unlikely.

before reaching their penalty verdict. There was no objection to the rereading of CALJIC No. 8.84.2, nor did trial counsel propose or request any further instructions. No further instructions were required; no prejudice from the court's replies to the jurors' inquiries is shown.

12. *Automatic Motion for Modification of the Death Verdict*

In every case in which a death penalty is returned, the judge must "review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances ... and shall make a determination as to whether the jury's findings and verdicts that the aggravating circumstances outweigh the mitigating circumstances are contrary to law or the evidence presented. The judge shall state on the record the reason for his findings." (§ 190.4, subd. (e).)

Defendant urges three grounds of error in the court's ruling on the automatic motion for modification of sentence. First, he contends that the content of a letter which the trial judge sent to the jurors — after they were discharged but prior to the hearing on the motion — reveals that the court had prejudged the merits of the motion, and could not thereafter render a fair and impartial decision. Second, he argues that the court's "verbatim" adoption of the proposed findings of fact and conclusions of law prepared by the prosecutor reflects a failure to exercise independent judgment in ruling on the motion. Finally, he contends the court improperly found lack of remorse as an aggravating factor in its findings on the motion.

a. The Letter

Several days after the jury returned its penalty verdict and was discharged, the trial judge sent the 12 jurors and 4 alternates a letter in which he praised the manner in which they had approached their task and obligations. He indicated his feeling that they were "a credit to the criminal justice system," and explained: "It was extremely difficult for me to express these

thoughts to you upon your discharge. It was an emotional moment; we had spent many hours together and I now feel I must express my gratitude to you." He added: "*Your decision is acceptable and shall be followed* (italics added)." It is this passage which, defendant urges, reveals that the court had prejudged the merits of the automatic motion for modification of his death sentence.

At the hearing on the motion, defense counsel expressed concern "that what was said in that letter would indicate in any way that the Court had made a decision prior to fully reviewing and hearing everything that was going to be said." The court responded: "Thank you. The statement, [']your decision is acceptable and shall be followed,['] is not indicative of the Court having made up its mind nor is it a statement that would forebear any statements, evidence, testimony that would be offered on behalf of Mr. Belmontes. [¶] *I think the statement was made for therapeutic purpose more than a legal purpose* (italics added)." Counsel did not request the trial judge to recuse himself from hearing the motion. At the conclusion of the hearing the court reaffirmed that it had made an "independent finding" in affirming the jury's verdict of death.

Subsequent to a jury's discharge, it is not improper to thank or praise the jurors for having dutifully served on the jury and conscientiously performed their functions. In a long and complex capital trial such as this was, it is understandable that the court might want to express gratitude to the jurors along these lines. The trial judge's communication to the jurors by letter here was plainly intended to convey such sentiment.

However, at the time the court sent the letter, it had not yet fully performed its own functions and obligations under the mandate of section 190.4, subdivision (e). Judgment and sentence had yet to be imposed. The court's remark in the letter: "Your decision is acceptable and shall be followed," was patently improper. The court must refrain from making any comment indicating that it cannot, or will not, perform its remaining

obligations fairly and impartially under the law. Since the jury had performed its functions and properly been discharged, our concern here is not with the fact that the communication was made to the jurors, but with whether the remark establishes an inference that the court *in fact* had prejudged the merits of the motion, and therefore could not fairly and impartially perform its statutory obligations in ruling thereon.

"It is presumed that official duty has been regularly performed." (Evid. Code, § 664.) "'[I]n the absence of any contrary evidence, we are entitled to presume that the trial court ... properly followed established law.' [Citation]." (*Ross* v. *Superior Court* (1977) 19 Cal.3d 899, 913 [141 Cal.Rptr. 133, 569 P.2d 727].) Considering the improper remark in the context of the letter in which it was made, together with the court's credible explanation that it "was made for therapeutic purpose more than a legal purpose," we conclude defendant has not established that the trial judge ultimately failed to make the "independent determination" respecting the appropriateness of the penalty verdict, as he was obliged to do under section 190.4, subdivision (e). The court's thorough and detailed findings entered in the record reinforce our conclusion.

b. The Findings

Prior to the hearing on the automatic motion, the prosecutor requested permission to submit proposed findings of fact and conclusions of law in opposition to modification of the death sentence. Defense counsel stated: "I have no problem with it," but requested that he too be permitted to do the same. The prosecutor thereafter filed lengthy and detailed proposed findings of facts and conclusions of law. Defense counsel elected to file points and authorities in support of automatic modification of the death sentence. We find nothing improper in affording both defendant and the People the opportunity to file respective supporting and opposition memoranda in connection with the proceeding. Thoughtfully prepared documents of this type are of great assistance to a trial judge.

It is clear from the record that the court relied extensively on the prosecutor's proposed written findings, incorporating whole portions of them almost verbatim into its own findings in the record. The record likewise reflects that the court did not "rubber stamp" the prosecutor's proposed findings of fact, refusing to subscribe to many of his overly conclusory proposals.

For example, the prosecutor proposed that the court adopt the following findings: "The defendant, while waiting in the victim's home and while talking to her, considered the alternatives available and decided to go through with the burglary, even though the victim was at home. By disabling the victim, he reasoned, the burglary could be completed unimpeded and by killing her, he decided, he would avoid identification as the perpetrator. The defendant knew from his conversations with Vasquez and the victim, that only Vasquez would be suspected. He knew that no one had seen him arrive at the home. He also knew he could hide out in Stockton or Southern California. Therefore, he concluded, the death of Steacy McConnell would eliminate the only person who could link him to the crime, except for his partners in the criminal enterprise, whom he counted on to maintain silence." These proposed "findings of fact" were riddled with *conclusory* inferences of defendant's state of mind; the court quite properly rejected them.

The prosecutor proposed a finding that, upon alighting from the Chevy, Bolanos and Vasquez "were able to hear the beating taking place inside." Although such was a fair inference to be drawn from the evidence, the court took pains to more accurately paraphrase the trial testimony, finding: "As they were outside they were able to hear the sound of thumping taking place inside, according to Ballanos' [*sic*] testimony." The prosecutor also proposed that the court make a finding that after the crime, while in the car, "[defendant] then stated that he had killed her to silence a witness." The court more accurately found that: "He then stated he had to take out a witness."

Our review of the court's detailed findings in the record

convinces us that it fulfilled its statutory obligation to independently review the jury's verdict of death.

c. Lack of Remorse

Defendant argues that the court improperly made a finding that his lack of remorse was an aggravating factor. The prosecutor proposed that the court find: "[T]he defendant expressed no remorse of even the slightest degree pretrial, in his guilt phase testimony, in his penalty phase testimony, nor during his closing remarks to the jury at the penalty phase." The court instead made a finding that: "The defendant did not express any remorse in the guilt phase of his testimony. In his penalty phase, however, he did indicate to some slight degree his concern for the victim." This finding was included in that portion of the overall findings discussing mitigating circumstances. For reasons already explained, we find that both the prosector, in his argument to the jury, and the trial court, in its own findings on the automatic motion for modification of sentence, did no more than suggest the inapplicability or insubstantial evidence of remorse as a *mitigating* factor. (*People* v. *Rodriguez, supra*, 42 Cal.3d at p. 790.)

13. *Proportionality Review*

Defendant urges that we conduct "intercase" proportionality review — i.e., an examination of whether imposition of the death penalty in his case is disproportionate to the penalties imposed on other persons who have committed similar offenses. It is settled that the Eighth Amendment requires no such comparison. (*Pulley* v. *Harris, supra*, 465 U.S. at pp. 51-54 [79 L.Ed.2d at pp. 41-43].)

Defendant urges that principles of *equal protection* require that he — as a capitally sentenced defendant — be afforded comparative sentence review equivalent to that provided for determinately sentenced felons under the "disparate sentence" statute. (§ 1170, subd. (f).) We have recently rejected the

identical argument in *People* v. *Allen, supra*, 42 Cal.3d at pages 1286-1287.

Defendant argues that state and federal proscriptions against "cruel and unusual punishment" require that we conduct "intracase" proportionality review — i.e., an examination of whether defendant's death sentence is proportionate to his individual culpability, irrespective of the punishment imposed on others. (E.g., *People* v. *Dillon* (1983) 34 Cal.3d 441, 477-482 [194 Cal.Rptr. 390, 668 P.2d 697]; *People* v. *Lynch* (1972) 8 Cal.3d 410, 423-424 [105 Cal.Rptr. 217, 503 P.2d 921].)

Defendant was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality. He bludgeoned McConnell to death with an iron dumbbell bar; the force of the 15 to 20 some-odd blows leaving her with gaping wounds and a cracked skull. Her defensive wounds plainly evidenced a desperate struggle for life at defendant's hands. The murder occurred in the course of a calculated plan to burglarize the victim's home, to which defendant had gained entry on false pretenses. After the murder, defendant and his accomplices callously fenced the victim's stereo components for $100 — purchasing beer with a portion of the proceeds.

In the penalty phase the jury was fully apprised of all the factors properly bearing upon whether defendant was eligible for, and deserved, the death penalty. There was, of course, defendant's relative youth, evidence that he had a difficult childhood, and evidence that prior to the murder he had to some degree embraced religion and impressed others with his sincerity in this regard. However, "nothing in prior decisions of this court, or of the federal courts, suggests that his punishment is constitutionally disproportionate to 'the offense' or 'the offender.'" (*People* v. *Melton, supra*, 44 Cal.3d at p. 771.)

III. CONCLUSION

We find no prejudicial error, whether viewed singly or

cumulatively, at either the guilt or penalty phases of defendant's trial.

The judgment is affirmed.

Lucas, C. J., Mosk, J., Broussard, J., Panelli, J., Arguelles, J., and Kaufman, J., concurred.

Appellant's petition for a rehearing was denied August 18, 1988, and the opinion was modified to read as printed above.

United States Court of Appeals,
Ninth Circuit.
Fernando BELMONTES, Jr., Petitioner-Appellant,
v.
Jill L. BROWN, Warden, for the California State Prison at San Quentin,*
Respondent-Appellee.

* Jill L. Brown is substituted for her predecessor, Jeanne S. Woodford, as Warden of California State Prison at San Quentin. *See* Fed. R.App. P. 43(c)(2).

No. 01-99018.

July 15, 2005.

Background: State prisoner filed petition for writ of habeas corpus, challenging conviction of first-degree murder and resulting death sentence, affirmed at 45 Cal.3d 744, 755 P.2d 310, 248 Cal.Rptr. 126. The United States District Court for the Eastern District of California, David F. Levi, J., denied petition, and petitioner appealed. The Court of Appeals, 350 F.3d 861, affirmed in part, reversed in part, and remanded with instructions to vacate sentence. Petition for writ of certiorari was granted.

Holdings: On remand from the United States Supreme Court, 125 S.Ct. 1697, the Court of Appeals, Reinhardt, Circuit Judge, held that:

(1) prosecutor's failure to disclose that evidence to the defendant did not deprive the defendant of due process;

(2) prosecutor's failure to correct state witness's false testimony did not violate defendant's due process rights;

(3) claim that he was deprived of due process and effective assistance of counsel was not barred from federal habeas review by the *Teague* nonretroactivity doctrine;

(4) waiver of conflict interests arising from his trial counsel's

multiple prior representations of codefendant was invalid;
(5) defendant failed to establish that conflict of interest engendered by trial counsel's prior representation of codefendant resulted violation of the Sixth Amendment;
(6) information allegedly omitted from arrest warrant affidavit was not "material," and thus, omissions did not cause magistrate to issue warrant without probable cause;
(7) instruction was insufficient to satisfy Eighth Amendment requirement that jury consider and weigh all mitigating evidence presented by defendant; and
(8) instructional error was not harmless.
Affirmed.

O'Scannlain, Circuit Judge, concurred in part, dissented in part, and filed opinion.

Eric S. Multhaup, Mill Valley, CA; Christopher H. Wing, Sacramento, CA, for the petitioner-appellant.

Mark A. Johnson, Deputy Attorney General, Sacramento, CA, for the respondent-appellee.

On Remand from the United States Supreme Court.

Before REINHARDT, O'SCANNLAIN, and PAEZ, Circuit Judges.

Opinion by Judge REINHARDT. Opinion concurring in part and dissenting in part by Judge O'SCANNLAIN.

REINHARDT, Circuit Judge.

I. PREAMBLE

On July 15, 2003, we filed an opinion in this case holding that there is a reasonable probability that as a result of instructional

error the jury did not consider constitutionally mitigating evidence at the penalty phase. We remanded to the district court for the issuance of a writ of habeas corpus vacating the death sentence. *Belmontes v. Woodford,* 350 F.3d 861 (9th Cir.2003). The warden timely petitioned the Supreme Court for a writ of certiorari. On March 28, 2005, the Supreme Court granted the writ, vacated our judgment, and remanded the case "for further consideration in light of *Brown v. Payton,* 544 U.S. ----, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005)." *Brown v. Belmontes,* --- U.S. ----, 125 S.Ct. 1697, 161 L.Ed.2d 518 (2005) (mem.).

Upon careful consideration, we conclude that *Payton* does not affect our holding in the present case. Notwithstanding the similarity of the factual and legal issues, *Payton* was a post-AEDPA case and was decided under the highly deferential AEDPA standard, while the case before us is pre-AEDPA and is determined by the application of the ordinary rules of constitutional interpretation. Under AEDPA, if a state court reasonably determines the facts and correctly identifies the governing federal standard, a federal court can grant a writ of habeas corpus only if the state court was objectively unreasonable in its application of clearly-established Supreme Court law. Such is not the case when AEDPA does not apply. In such circumstance, we simply resolve the legal issue on the merits, under the ordinary rules. Because we recognize "that AEDPA wrought substantial changes in habeas law," *Williams v. Taylor,* 529 U.S. 362, 387 n. 14, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (plurality opinion), we must be careful not to confuse AEDPA's deferential standard of review with the pre-AEDPA standard we employ in this and in other pre-AEDPA cases. As *Williams* points out, if anything about AEDPA is clear, it is that "an unreasonable application of federal law is different from an incorrect application of federal law." *Id.* at 365, 120 S.Ct. 1495. The issue here is not the AEDPA issue that the Court confronted in *Payton,* but whether the state court engaged in an "incorrect" application of federal law.

In *Payton*, the Supreme Court held that the state court was not objectively unreasonable in concluding that the use of California's factor (k) did not unconstitutionally prevent the jury from considering relevant postcrime mitigating evidence. *Payton* did *not* hold, however, that the use of the challenged factor was itself constitutional or unconstitutional, either as a matter of fact or law. Unlike in *Payton*, here we are required to determine that very question and our determination must be made by applying the ordinary pre-AEDPA rules.

In concluding in our earlier opinion that California's factor (k), coupled with the trial judge's instructions, resulted in a reasonable probability that the jury did not consider Belmontes' principal mitigating evidence, we reached an independent legal judgment as to the constitutionality of the challenged instruction. In doing so, we were free to, indeed required to, determine the constitutional question on its merits. Having carefully reviewed *Payton*, and our previous independent determination of the constitutional question at issue, we find no reason to change our judgment on the matter. We reaffirm our previous opinion, and reiterate it below.[1/]

---

1. Of the eight Justices who participated in the consideration of *Payton*, four specifically reached the same legal conclusion that we reach here: California's factor (k) may cause a jury to fail to consider constitutionally relevant postcrime mitigating evidence. In addition to the three dissenting Justices in *Payton*--Justices Stevens, Souter, and Ginsberg--who would have found the use of California's factor (k) unconstitutional even under the heightened deferential AEDPA standards, Justice Breyer, who joined the majority opinion, specially concurred to note that had he been making an independent determination of the constitutional issue on the merits, he likely would have held the "Payton's penalty-phase proceedings violated the Eighth Amendment," which "[i]n a death penalty case ... requires sentencing juries to consider all mitigating evidence." *Payton*, 125 S.Ct. at 1442 (Breyer, J., concurring). Two of the other four Justices in the majority held only that it was not objectively unreasonable for the state court to have concluded that the jurors most likely believed that the evidence in mitigation was permitted by California's factor (k) and that they considered

II. INTRODUCTION

In this pre-AEDPA death penalty case, Petitioner Fernando Belmontes, Jr., appeals the district court's denial of his petition for writ of habeas corpus. Because the jury was not instructed that it must consider Belmontes' principal mitigation evidence, which tended to show that he would adapt well to prison and would likely become a constructive member of society if incarcerated for life without possibility of parole, and because there is a reasonable probability that the instructional error affected the jury's decision to impose the death penalty on Belmontes, we grant the petition with respect to the penalty phase. We reject, however, those claims that seek relief from the judgment of conviction and the finding of special circumstances. Accordingly, we affirm the district court's decision in part, reverse in part, and remand with instructions to issue a writ vacating the death sentence.

III. FACTUAL AND PROCEDURAL BACKGROUND

A. The Crime, Its Investigation, and Pretrial Proceedings

On the morning of Sunday, March 15, 1981, 19-year-old Steacy McConnell telephoned her parents and stated that she was afraid because several people, including codefendant Domingo Vasquez, had threatened her. Several hours later, McConnell's parents arrived at her residence in Victor, California, and found

---

that evidence in their deliberation, but those Justices, O'Connor and Kennedy, expressed no view as to how they would have decided the constitutional question had they not been required to apply AEDPA's highly restrictive standard. *See Payton*, 125 S.Ct. at 1442. Only two Justices, Scalia and Thomas, stated that regardless of whether they applied the pre-or post-AEDPA rules, they would have held that limiting a jury's discretion to consider mitigating evidence does not constitute a constitutional violation. *See id.* (Scalia, J., concurring).

her lying unconscious in a pool of blood. She died shortly thereafter from cerebral hemorrhaging caused by fifteen to twenty blows to her head with an iron bar. Her skull was cracked, and she had defensive injuries on her hands, arms, and feet. The house was ransacked and her stereo was missing.

On the Tuesday preceding the murder, several people, including Vasquez and another codefendant, Robert "Bobby" Bolanos, partied at McConnell's house. Although Bolanos left the residence early Wednesday morning, the party continued until Friday, when Vasquez stole a quantity of "black beauties"--amphetamine pills--from McConnell. Upon discovering the theft, McConnell threw Vasquez and his friends out of the house. The group subsequently discussed their dislike of McConnell.

Police investigation of the individuals who had been present at the party extended to Vasquez, and ultimately to Bolanos, who drove a distinctive black Chevy. The police recognized Bolanos' car as matching the description of the car that had been seen in McConnell's driveway at the time of the murder. The police impounded the car and interrogated Bolanos. Bolanos eventually admitted that he had been involved in the events that led to McConnell's death; he identified Vasquez and Petitioner Fernando Belmontes, Jr., who had not been at the party but who had been visiting him over the weekend of the murder, as his coadventurers. On the strength of Bolanos' statement, the police obtained a warrant and headed South to Ontario, where they arrested Belmontes at his brother's home. Belmontes was nineteen at the time.

Belmontes, Bolanos, and Vasquez were each charged with first degree murder and special circumstances. However, Bolanos soon arranged a deal with the prosecution in which he agreed to testify against Vasquez and Belmontes in exchange for a guilty plea to second degree burglary and immunity on the murder charge. At Vasquez's preliminary hearing, Bolanos

fingered Belmontes as the main assailant. After the preliminary hearing, the trial judge dismissed the special circumstances charge against Vasquez, and he pled guilty to second degree murder. That left Belmontes, who alone proceeded to trial.

B. The Guilt Phase

Bolanos was the principal witness for the state. He testified that on the morning of Sunday, March 15, he and Belmontes drove to Vasquez's residence to hang out. When they arrived, Vasquez was on the phone with McConnell. When Vasquez hung up the phone, he informed them that McConnell would not be home during the latter part of the day. The three were short of cash, and they agreed to burglarize McConnell's residence, steal her stereo, and "clean house." Vasquez's wife, Karrie Lynn, testified that as the men departed through the kitchen, Belmontes grabbed from the counter an iron dumb-bell bar, which she used for rolling tortillas.

Bolanos told the jury that the three men drove to McConnell's house in Bolanos' vintage, black car and parked a short distance from the house. According to Bolanos, Belmontes stated that he would approach the house alone, on foot, carrying the metal bar in case he needed to force entry, so that he could gather McConnell's valuables and place them near the door to facilitate a quick getaway, and that the other two should wait for about five minutes and then bring the car around to McConnell's house.

Bolanos testified that the events unfolded as follows:

Belmontes left his wristwatch with him, concealed the bar under his jacket, and walked to McConell's residence. Bolanos and Vasquez waited about five minutes, then drove up and backed into McConnell's driveway. Vasquez tried to open the trunk but could not find the right key. Bolanos got out of the vehicle to assist Vasquez. He heard repeated knocking or

banging noises coming from within the house. Bolanos unlocked the trunk and got back inside the car, while Vasquez walked to the front door to assist Belmontes. Shortly thereafter, Belmontes and Vasquez emerged from the back door of the house carrying stereo components. Belmontes was sprinkled with blood on his face, pants, and shoes. Vasquez "looked like he had seen a ghost." Belmontes stated that he had had to "take out a witness" because she was home. He explained that when McConnell heard Vasquez and Bolanos drive up, she looked away from him and he seized the opportunity to hit her with the bar approximately fifteen times.

Lucy Flores, McConnell's neighbor, testified that on the morning of the murder she watched Bolanos' Chevy as it backed into McConnell's driveway. She observed a man get out of the passenger side and try to unlock the trunk. He appeared to be having difficulty, whereupon the driver got out of the car and unlocked it. The driver got back in the car, while the passenger walked towards the front of McConnell's house and met a third man. She did not see where the third man had come from. The two men headed toward the front of McConnell's house. A short while later, she saw them exit McConnell's house from the back door, carrying stereo equipment, which they loaded in the trunk before getting in the car and driving away.

Bolanos testified that, after leaving McConnell's house, the three drove to the nearby city of Galt, where they intended to fence the stereo. En route, Belmontes wiped blood from the metal bar and his shoes. Belmontes threw the bar out of the window as they crossed a bridge over the Mokelumne River.[2/] They went to the home of Manuel Vasquez, Domingo's brother, where Belmontes changed his pants. The three contacted Raul Barron, who met them at the home of Irma Vasquez, Domingo's

---

2. Bolanos later led police to the location on the river bank from which the bar was recovered.

sister, and purchased McConnell's stereo components from them. Barron later testified that he paid $100 for the stereo to a man wearing a baseball cap (Belmontes), who did most of the talking.

Teresa Cobarrubio, Bolanos' girlfriend, testified that Bolanos gave her fifteen dollars from the proceeds of the sale of the stereo. Acting scared, he informed her that he, Belmontes, and Vasquez had burglarized McConnell's residence. The following day, Bolanos and Cobarrubio read a newspaper account of McConnell's murder, and Bolanos related further details of the crime. He told Cobarrubio that he had remained in the car, and that Belmontes had exited the house with blood on his clothes and had stated that he "had to take a witness out."

Bolanos testified that on Monday, March 16, Vasquez called him to advise that he had been questioned by police and did not want to "take the rap" for the murder. Bolanos and Belmontes went to Vasquez's house, where the three conferred. Karrie Lynn Vasquez testified that from the kitchen she overheard Belmontes say that he entered McConnell's house alone and hit her multiple times with the bar before Vasquez joined him in the house.

Barbara Murillo, Belmontes' girlfriend, testified that after the meeting, Belmontes telephoned her and told her that he was "in trouble." He reported that he had gotten into an argument with McConnell at her house, become angry and hit her, and that she fell and "went to sleep," although he "didn't mean for her to go to sleep."

Detective Holman, the lead investigator, testified that Belmontes furnished three tape-recorded statements shortly after his arrest. In the first statement, he denied any involvement in the crime. In the second, he admitted the burglary but denied hitting McConnell. In the third statement, he admitted hitting McConnell, but insisted that he only hit her once, and then only at Vasquez's direction. He stated that the single blow he

delivered caused McConnell to fall down, whereupon he dropped the bar and began searching the house for valuables, leaving Vasquez alone with McConnell. Belmontes contended that he did not pay attention to Vasquez's actions during this period and did not observe how McConnell came to have suffered fifteen to twenty fatal blows to her head. Holman also testified that a small drop of blood found on the tongue of one of Belmontes' shoes tested as "type O"--McConnell's blood type.

Dr. Maduros, the pathologist who performed the autopsy on McConnell, testified that she died from cerebral hemorrhaging caused by fifteen to twenty blows to the back left portion of her skull. She had a separate contusion on her right temple, which was caused by a single blow of lesser force that did not lacerate the skin. However, this blow alone would not have caused death and, if it had been the first, it would not likely have caused unconsciousness. Injuries to McConnell's arms, hands, legs, and feet evidenced a struggle. According to Dr. Maduros, there would have been sounds "like a cracked pot" associated with the blows that fractured McConnell's skull, and blood would have splattered in a manner consistent with the blood patterns found on the door jambs in her house.

Belmontes testified in his own defense. He insisted that Vasquez dealt the fatal blows while he, Belmontes, searched the back part of the house for something to take. Belmontes recounted that he and Bolanos had gone over to Vasquez's house, and that when Vasquez mentioned that McConnell would not be home, they decided to steal her stereo. Although they expected McConnell to be away, the plan was that Belmontes would go to the door in case she turned out to be home; because of the unhappy denouement of her party a few days earlier, McConnell would become angry and suspicious if she saw Vasquez or Bolanos at her door. Although Belmontes had met McConnell a few times in the past, she did not know that he was a friend of Vasquez and Bolanos.

Belmontes' version of events was consistent with Bolanos' up to the point of who struck the blows that killed McConnell. Belmontes agreed that Vasquez and Bolanos stayed in the car while he walked to McConnell's front door. He stated that Vasquez had given him the metal bar to use to break a window; but that he concealed it in his sleeve. According to Belmontes, he knocked at McConell's door and, to his surprise, she answered. As soon as he found out that she was home, he abandoned his intent to burglarize her residence. He told her that he was hitchhiking and had stopped by because it was raining. McConnell invited him in. She noticed a bulge in his sleeve and asked what it was. He showed her the bar and explained that he had it because he was hitchhiking. He used McConnell's bathroom and then stood by the table and talked to her while she ironed clothes. McConnell told him that she was having problems with some people and asked him if he knew Domingo Vasquez. Belmontes said that he had met him.

Belmontes' testimony continued: Five minutes after he entered the house, Bolanos and Vasquez pulled into the driveway. McConnell started walking toward the front door. Belmontes followed behind her and was placing the bar back up his sleeve when Vasquez rapped on the door. Under Belmontes version, when Bolanos' car backed into the driveway, Vasquez would have had to proceed immediately to the front door; he would not have had time to go to the trunk of the car to attempt to open it.

According to Belmontes, after he knocked at the door to McConnell's house, Vasquez pushed it open, saw McConnell, and ordered Belmontes to "hit her." Belmontes followed Vasquez' directive and, using a backhanded sweeping motion, struck McConnell on the side of her head with the bar. She fell to the floor. Belmontes dropped the bar, ran to the back bedroom, broke down the door, searched that room and the kitchen, and returned to the living room. He did not enter the

master bedroom. Upon returning to the front of the house, he observed Vasquez standing over McConnell and holding the metal bar. He did not see Vasquez hit McConnell or hear any blows landing because he was not paying attention. He could not explain the presence of defensive bruises and contusions on McConnell's hands, arms, and feet.

The rest of Belmontes' testimony is, with one significant exception, consistent with Bolanos': Belmontes and Vasquez gathered the stereo components and exited from McConnell's back door. They loaded the stereo components into the trunk. Vasquez got in the back seat, Belmontes rode shotgun, and Bolanos drove. According to Belmontes, while en route, Vasquez handed him the steel bar, which had flesh and hair residue on it, and then Vasquez (not Belmontes) stated that he had had to take out a witness. Belmontes, still wearing his gloves, wiped blood off the bar and set it down on the floorboard. He was uncertain whether there was blood on his pants when he left McConnell's house; he said that the blood might have come off the bar when he placed it on the floorboard. He denied having wiped any blood off of his shoes and asserted that Bolanos and Vasquez told him to throw the bar out his window into the river, and that he complied.

Belmontes concluded his testimony by stating that the three drove to Manuel Vasquez' house, where he changed into a pair of Manuel's pants. Manuel contacted Raul Barron, whom they then met at Irma Vasquez' house. Barron bought the stereo for $100. Bolanos, Vasquez and Belmontes divided the money, bought some beer, and drove to the home of an acquaintance to purchase narcotics.

Belmontes' girlfriend, Barbara Murillo, testified that six months after the murder, she ran into Cobarrubio at the Grape Festival. Murillo believed that Belmontes was the murderer. However, when she asked Cobarrubio for further details about

the crime, Cobarrubio claimed that Belmontes had been "set up" because he had no backup in the area, whereas Vasquez had a network of local friends.[3]

After three hours of deliberation, the jury convicted Belmontes of first degree murder with special circumstances. It also made special findings that Belmontes was the actual killer and that he had the specific intent that death occur.

C. The Penalty Phase

At the penalty phase, the prosecution introduced minimal aggravating evidence. Detective Holman authenticated two autopsy photographs depicting McConnell's wounds. William Cartwright, manager of a motel in Ontario, California, testified to an incident in early 1979 in which an individual named Rudy met Belmontes at a motel and attempted to sell him a .32 caliber automatic handgun that he had acquired in a burglary. Belmontes reportedly examined the loaded weapon, cocked the trigger, pointed it at Rudy and stated, "I've got it now. Why buy it?" Rudy left the premises and Belmontes retained the weapon.

Steven Cartwright testified that he had a conversation with Belmontes in February 1979 in which Belmontes alluded to the fact that some people were upset with him. As Belmontes talked, he indicated that he had a gun in his belt by slapping his side, and he stated that he was not concerned because he had all the protection he needed. Ron Cutler, a California Youth Authority ("CYA") counselor, testified that he once observed

---

3. Cobarrubio testified that she recalled running into Murillo at the Grape Festival. Murillo had asked her whether she thought Belmontes "might have been set up." Cobarrubio replied: "Well, he might have." Cobarrubio testified further that in fact she had no information from any source that Belmontes had been set up but answered as she did because she felt sorry for Murillo.

Belmontes swinging a chair as if he were about to hit another ward, but Cutler was able to intervene before a fight ensued. On cross examination, he admitted that Belmontes was significantly smaller than the other youth.

Barbara Murillo testified about a domestic violence incident that occurred when she asked Belmontes to move out of their shared apartment and to give her his keys so he could not come back. During the fight that ensued, Murillo, who was four months pregnant with Belmontes' second child, grabbed a "file" for protection and attempted to phone the police, but Belmontes cut the telephone cord with his knife. Belmontes pushed her and hit her on the head, at one point causing her to drop their infant daughter. He tried to choke her, but they were separated by friends who were present. Murillo fled through a window, but Belmontes dragged her back to the vicinity of the apartment. A neighbor eventually summoned the police, who arrived as Belmontes was leaving the premises.

Finally, the prosecution and defense stipulated that Belmontes entered a plea of no contest in April 1979 to a charge of being an accessory after the fact to voluntary manslaughter. The court refused to allow the prosecutor to introduce evidence that Belmontes had actually murdered the victim, Jerry Howard.[4/] Consequently, the jury never heard any details of the murder or Belmontes' alleged role in it.

Belmontes' mitigation presentation was also limited in scope, focusing on two themes: his family and personal history and his capacity for rehabilitation and positive institutional adjustment.

---

4. The prosecutor's proffer included testimony from an eyewitness who saw Belmontes shoot Howard, a CYA counselor to whom Belmontes had confessed that he did so, another individual who saw Howard get into a car with Belmontes on the evening he was killed, and the police officer who found the murder weapon at Belmontes' house.

It was primarily the latter theme that defense counsel pressed upon the jury.

Belmontes' family history was one of poverty and violence. His maternal grandfather, Michael Salvaggio, testified to his daughter's unhappy marriage to Belmontes' father. Salvaggio recounted that his daughter was sixteen when she ran away from home and married Belmontes' father, who was unemployed, refused to support his family, drank to excess, and beat her. Salvaggio said that he was "very close" to his grandson until Belmontes was about thirteen but after that had little contact with him. However, Salvaggio continued, when Belmontes was sixteen and his grandmother lay dying in the hospital, he visited her every day; he also attended her funeral.

Carol Belmontes confirmed that her marriage to Belmontes' father was unhappy. Fernando Belmontes, Sr., was a violent alcoholic who "wouldn't ever work," and who beat her, breaking her arm on one occasion and stabbing her on another. Belmontes was ten years old when the marriage broke up. Mrs. Belmontes remarried. That marriage broke up five years later, when Belmontes was about fifteen, after which he became difficult to control. Belmontes had not lived with his mother since he was committed to the CYA two years before McConnell's murder. He had a younger brother and sister, to whom he was "very close."

Belmontes again testified on his own behalf. He recounted that he had a poor relationship with his father, who often came home drunk and hit his mother. He did not like school and stopped attending in the ninth grade. He wanted to get a job so that he could help his mother pay the bills. Although he described his youth as "pretty hard," he twice stressed that he did not want to "use it as a crutch."

Robert Martinez, a close friend of Belmontes' since their early

teens, testified that he and Belmontes spent a great deal of time together, usually working on Martinez's low-rider car. Belmontes served as best man at Martinez's wedding and was someone he could turn to for advice and support when he argued with his wife. Martinez also testified that he felt Belmontes was not a violent person. However, with defense counsel's consent, this testimony was struck following an objection from the prosecutor, who argued that if this evidence was admitted, the prosecution should be allowed to impeach Martinez with the evidence regarding the Jerry Howard murder.

More important by far was the second mitigation theme--that Belmontes could lead a positive, constructive life if confined within an institutional setting. The state agrees that Belmontes' counsel, John Schick, presented "substantial evidence" in support of this theme in the form of a series of witnesses who testified to Belmontes' behavior and achievements during his prior CYA incarceration and to the likelihood that he would make positive contributions to the welfare of others if his life was spared. Belmontes himself testified that he was in the custody of the Youth Authority from early 1979 until November 1980, four months prior to the crime. While at the CYA, he was employed on the fire crew at the Pine Grove Camp for one year, during which he worked his way up from last man to number two, a position of leadership and responsibility. Belmontes also testified that during his incarceration he became involved in the M-2 Christian sponsorship program. He admitted that he initially entered the M-2 program as a way to get out of camp, but he explained that he was touched by the decency of his M-2 family, the Haros, and so gradually became curious about Christianity and embraced it.

Belmontes continued by saying that he was paroled from the Youth Authority after serving his maximum sentence; that he stayed at the halfway house in Oakland for two weeks and then went to Southern California for a short period, returning with

Murillo to the Lodi area to take a job with the forest service; and that he subsequently moved to Lodi in part so that he could be close to the Haros. However, outside of the institution, Belmontes said, he had trouble maintaining his religious commitment and "started going back to [his] old ways," in part due to "pressure on the streets." At the time of trial, he had not abandoned his religious beliefs but felt that he was no longer "dedicated one hundred percent" to his religious commitment. He testified that he would hope to make positive contributions to society if he were ordered incarcerated, though he had little specific idea of how he might do so.

The Reverend Dale Barrett, chaplain at the Youth Authority's Pine Grove Facility, testified that he knew Belmontes from his participation in the M-2 Christian sponsorship program, which matched a local church-going family with a ward, who would be permitted to leave the facility to visit with the family at specified times each week. Barrett explained that Belmontes was matched with Beverly and Fred Haro and participated in the program for about a year. In addition, Belmontes was baptized during his stay in the CYA. Only a small percentage of program participants who made a serious commitment to Christianity were baptized. Barrett felt that, unlike the many wards who stayed in the program only to get out of camp and manipulate favors from the sponsoring families, Belmontes had not "conned" them. Barrett testified that although he personally believed in the death penalty, he did not think Belmontes deserved to die because he was a "salvageable" person with "a lot of extenuating circumstances in his life." Barrett was of the view that Belmontes' involvement in the McConnell murder was attributable to "the enormity of the peer pressure and the kind of sociological circumstances that were part of his life," and he thought that if Belmontes were granted a life sentence, he would make positive contributions to prison life through his involvement with the prison ministries.

Don Miller, assistant chaplain at the Youth Authority's Preston Facility and the Northern California Director of the M-2 program, testified that he helped place Belmontes in a halfway house in Oakland upon his release from the CYA. Miller stated that, at the time, he felt "a little bit doubtful" about Belmontes' ability to lead a productive life outside of a highly structured environment, like prison. Miller testified that Belmontes stayed at the halfway house for only two weeks before moving to the Lodi area to take a job with the forest service. During those two weeks, however, Belmontes returned to Preston on a few occasions to speak to wards about what life was like "on the outside." Miller described Belmontes (and his message) as well-received by the CYA wards, and he believed that if Belmontes were committed to prison for a life term, he would be good at counseling other prisoners not to make the same mistakes that he had. Miller was enthusiastic about working with Belmontes in this capacity and stated that Belmontes "definitely would be used in the prison system for this kind of activity" because he related well to other prisoners, especially those who shared his ethnic background, and because these kinds of programs were "at the present time the only solution" to the troubling problem of recidivism among prisoners.

Finally, several witnesses offered evidence with respect to Belmontes' conversion to Christianity, which occurred during his first CYA incarceration, and his failure to maintain his religious commitment upon his release. Martinez's wife Darlene, a born-again Christian, testified that she had known Belmontes for six or seven years and considered him a close friend. Darlene recounted that when Belmontes visited them after his release from the Youth Authority, he told her that he was a born-again Christian. He also mentioned his disputatious relationship with his girlfriend, Murillo, and mentioned that he was planning to move in with her. During the conversation, Belmontes expressed concern that Murillo was not a Christian, and he worried that he would be unable to maintain his Christian faith on his own.

Beverly and Fred Haro, Belmontes' M-2 sponsors and members of Reverend Barrett's church, testified that Belmontes spent Wednesday evenings and weekends with them for almost a year. They felt they had a good relationship with Belmontes, who attended church with them. They treated him like their own son, and he opened up to them and was a good influence on their own teenage son. They saw him several times after his release from the CYA. Fred Haro stated that he had "compassion as a son" for Belmontes and that Belmontes had been genuine in his commitment to the M-2 program and his affection for his sponsors. Beverly Haro felt that Barbara Murillo was a "definite negative factor" in Belmontes' life.

At the conclusion of the evidentiary stage, the court permitted Belmontes to address the jury personally during closing arguments. Belmontes stated that he did not think that his difficult childhood excused his role in the McConnell murder. However, he explained that he could not handle the pressures of life outside of an institution, and he asked the jury to give him "an opportunity to achieve goals and try to better [him]self." Belmontes' attorney similarly stressed that Belmontes could not "make it on the outside." He argued that Belmontes had had a hard life but still retained his humanity. He characterized Belmontes as someone who thrived in a structured environment--as evidenced by his accomplishments while in the CYA--and asked the jury to spare Belmontes' life on the ground that he would make positive contributions if allowed to live out his natural life in prison.

The judge instructed the jury according to the then-standard model jury instructions, which directed the jury to consider as mitigating evidence the defendant's age, criminal history, and "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In addition, the judge read a portion of a supplemental instruction requested by the defense, which stated that the jury should view

the statutory factors "merely as examples of some of the factors" that it could consider, that the jury "should pay careful attention to each of these factors," and that "any one of them standing alone" could support a life sentence. The trial judge refused to read the most important part of the requested instruction, which stated: "[Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence." The jury was not informed that it should consider mitigating evidence bearing on Belmontes' probable future conduct if sentenced to life in prison without the possibility of parole. Shortly after Belmontes' trial, the California legislature revised the model jury instructions to make clear that the jury must consider any aspect of the defendant's character or record offered as a basis for a sentence less than death, "whether or not related to the offense for which he is on trial." CALJIC 8.85(k) (6th ed.1996).

The jury deliberated for a day and a half before reaching a verdict. On the first day, after several hours of deliberations, the jury sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought back to the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can." The trial judge refused to tell the jurors what would happen if they could not agree.

The trial judge emphasized that if the jurors "[went] over the instructions again with one another," they might find it easier to reach agreement. The jurors then asked the judge to clarify the instructions on the weighing of the aggravating and mitigating factors. One juror asked the trial judge whether the jury was supposed to take each listed (i.e., statutory) factor, decide whether it was aggravating or mitigating, and then "balance the sheet." Rather than instruct the jurors that it was their duty to

consider and, if appropriate, give effect to, all of the mitigating evidence presented by the defendant, whether comprehended by one of the statutory factors or not, the trial judge responded simply, "That is right," even though no statutory factor comprehended the element of rehabilitation. Shortly thereafter, another juror asked whether it was possible for Belmontes to receive psychiatric treatment while in prison. The trial judge responded, "That is something you cannot consider in making your decision." Following this colloquy, the jury returned a death sentence.

D. Post-Trial

The California Supreme Court affirmed Belmontes' conviction and sentence in 1988, *People v. Belmontes,* 45 Cal.3d 744, 248 Cal.Rptr. 126, 755 P.2d 310 (1988), and the U.S. Supreme Court denied certiorari in early 1989. Belmontes then filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, which was held in abeyance while Belmontes exhausted state remedies.

Belmontes filed a state habeas petition and received a stay of execution from the California Supreme Court. The 3 California courts summarily dismissed Belmontes' petition, refusing him compulsory process and denying him an evidentiary hearing on any of his claims. The California Supreme Court finally denied relief in 1992.

In 1993, proceedings on the federal writ commenced before a magistrate judge. In 1996, he denied Belmontes' request for an evidentiary hearing on certain claims but granted his motion to expand the record to include depositions, declarations, and reports submitted by the parties. The parties filed cross motions for summary judgment. In 2000, the district court withdrew the referral from the magistrate judge and, in August of that year, denied relief on all claims except six that had not yet been

briefed. The court referred those six claims to the magistrate judge for a recommendation. In January 2001, the magistrate judge recommended denying the outstanding claims, and in May 2001, the district court adopted the magistrate's findings and recommendations, denied the petition, and entered judgment against Belmontes. The district court issued a Certificate of Appealability for fifteen constitutional claims. This appeal timely followed.

IV. STANDARD OF REVIEW

Because Belmontes filed his habeas petition prior to AEDPA's effective date, we apply pre-AEDPA standards of review. *Woodford v. Garceau*, 538 U.S. 202, 123 S.Ct. 1398, 1401, 155 L.Ed.2d 363 (2003). State court factual findings are presumed correct unless one of eight enumerated exceptions applies. *See* 28 U.S.C. § 2254(d) (1994). The application of law to historical facts is reviewed *de novo*. *Thompson v. Borg*, 74 F.3d 1571, 1573 (9th Cir.1996).

V. GUILT PHASE ISSUES

A. Giglio *and* Napue *Claims*

Belmontes alleges that the state deprived him of due process by failing to disclose that Bolanos had several misdemeanor charges and that the prosecutor personally helped him achieve favorable dispositions on those charges. In a closely related claim, he contends that the prosecutor violated due process by failing to correct Bolanos' false and misleading testimony that he had never been "busted" before his arrest for the McConnell murder.

1. Factual Background

On the Wednesday morning before the murder, Bolanos drove

into a traffic signal on his way home from McConnell's house. A police officer witnessed the accident. After flunking a field sobriety test, Bolanos was taken into custody and charged with various misdemeanor driving offenses, including DUI and hit-and-run.

One week later, Bolanos was charged with first degree murder for his role in the McConnell murder. He soon entered into an agreement in which he pled guilty to second-degree burglary in exchange for testifying against Vasquez and Belmontes. He was granted immunity for his testimony and his sentence was left to the court's discretion. He received no explicit promises of leniency from the prosecution.

After Bolanos pled guilty to the burglary, he obtained a string of unusually favorable dispositions on several traffic offenses. First, with respect to the DUI/hit-and-run charges, his attorney appeared in municipal court along with Clark Sueyres, the district attorney who was prosecuting the case against Belmontes. On Sueyres' motion, the charges were dismissed in the interest of justice. Next, later that year, Bolanos was cited for driving an unregistered vehicle and driving with a suspended license. He was allowed to plead guilty to the lesser charge of driving without a valid license and assessed a $100 fine; the court dismissed the unregistered vehicle charge. The following April, Bolanos was again cited for driving an unregistered vehicle, driving with a suspended license, operating an unsafe vehicle, and driving with worn tires. Again, Sueyres personally asked the municipal court to dismiss the charges in the interest of justice. Bolanos, once again, pled guilty to driving without a valid license and paid a $75 fine. None of these matters was disclosed to the defense.

At trial, Bolanos admitted on cross examination that he was testifying under court order in exchange for a grant of immunity and that he would face a murder charge if he refused to testify.

However, Schick's efforts to impeach Bolanos were hampered by the fact that Bolanos continually minimized both his own culpability and the benefits he received from the prosecution in exchange for his testimony. For example, Bolanos told the jury that his motive in testifying was "to tell the truth," and he stated that because he "wasn't even around when the crime happened," he did not view the grant of immunity as a particular favor.

In addition, Bolanos was less than truthful when he testified about his prior contacts with law enforcement. When Schick questioned Bolanos about prior inconsistent statements that Bolanos had made to the police, Bolanos explained them by saying that he had made mistakes out of nervousness because it was "the first time I got busted." In fact, Bolanos had been "busted" twice before. In addition to the DUI/hit-and-run incident, Bolanos had previously been arrested for gun possession by Detective Holman, the same officer who arrested him for the McConnell murder. The arrest generated formal criminal charges, and Bolanos was sentenced to thirty days in a juvenile facility, of which he served fifteen.

2. Giglio *Claim*

The prosecution has an affirmative duty to turn over to the defense all evidence favorable to the accused, including impeachment evidence. *Kyles v. Whitley,* 514 U.S. 419, 432, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995); *Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). The failure to disclose favorable evidence violates due process when the evidence is material. *United States v. Bagley,* 473 U.S. 667, 678, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *Singh v. Prunty,* 142 F.3d 1157, 1161 (9th Cir.1998). Evidence is material if there is a reasonable probability that, had it been disclosed to the defense, the outcome of the trial would have been different. *Bagley,* 473 U.S. at 682, 105 S.Ct. 3375. A reasonable probability occurs when the suppression "undermines confidence

in the outcome of the trial." *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555 (internal quotation marks omitted).

Belmontes argues that the prosecutor violated due process by failing to turn over material impeachment evidence consisting of the existence and unusual disposition of Bolanos' misdemeanor traffic offenses. The state responds that the prosecutor had no duty to disclose this evidence because the misdemeanor violations were not mentioned in the plea agreement and were not dismissed as consideration for Bolanos' testimony against Belmontes. In support of this argument, the state cites the deposition testimony of both Bolanos and his attorney to the effect that they did not perceive the dismissal of the traffic offenses as related to the immunity deal.

The state's argument is without merit. We have held that when the state relies on the testimony of a criminal informant, it has an obligation to disclose "all information bearing on that witness's credibility," including "the witness's criminal record ... and any information therein which bears on credibility." *Carriger v. Stewart*, 132 F.3d 463, 480 (9th Cir.1997). We further emphasized the importance of this rule in *Benn v. Lambert*, in which we held that "the state cannot satisfy its *Brady* obligation to disclose exculpatory and impeachment evidence by making some evidence available and asserting that the rest would be cumulative. Rather, the state is obligated to disclose all material information casting a shadow on a government witness's credibility." 283 F.3d 1040, 1057-58 (9th Cir.2002) (internal quotation marks omitted). Here, the fact that the prosecutor personally appeared in municipal court to argue for favorable dispositions of Bolanos' misdemeanor traffic offenses casts a shadow on Bolanos' credibility regardless of whether such intervention was mentioned in the plea agreement or offered as consideration for Bolanos' testimony. Had defense counsel known about the existence and disposition of the misdemeanor offenses, he could have impeached Bolanos by showing that he

had a motive to say what the prosecution wanted to hear in hopes of obtaining a lighter sentence on his plea to second degree burglary. Even though Bolanos was not explicitly promised leniency, the fact that the prosecutor helped Bolanos obtain dismissals or reduced punishments on his traffic misdemeanors makes it more likely that he would intercede on Bolanos' behalf when it came time for sentencing on the burglary charge. Thus, the evidence was clearly relevant and admissible for purposes of impeachment, and the district attorney should have disclosed it.

Nevertheless, we hold that Belmontes' *Giglio* claim fails because, under the particular facts and circumstances of this case, the undisclosed evidence was not material. This case presents different circumstances from those in *Benn,* in which we held that the prosecutor's dispensation of similar favors on behalf of his star witness--including quashing a traffic ticket, dismissing a burglary charge, and postponing the filing of an arrest warrant until after Benn's trial--were material benefits. *Id.* In *Benn,* we held that the failure to disclose these benefits necessitated a new trial, even though the prosecutor disclosed that he had made a deal with the informant to seek a reduced sentence in exchange for his testimony against Benn, and defense counsel impeached the informant on this point. *Id.*

Aside from the fact that the undisclosed benefits in *Benn* may well have been more substantial than those at issue here, *Benn* is distinguishable for three reasons. First, Bolanos was actually involved in the McConnell murder, whereas the informant in *Benn* was a jailhouse snitch. Evidence that a jailhouse snitch received material benefits from the prosecution is especially important because without that evidence the informant masquerades as a disinterested observer. *See United States v. Bernal-Obeso,* 989 F.2d 331, 333-34 (9th Cir.1993) (describing practice of relying on criminal informants as "fraught with peril"). In this case, however, Bolanos was cross-examined extensively as to his role in the crime and the details of his

immunity agreement, so the jury could not possibly have viewed him as disinterested. Second, the impeachment evidence that was disclosed in *Benn* was relatively trivial; although the informant received sentencing leniency in his unrelated case, the leniency saved him only thirty-five days of jail time. *Benn*, 283 F.3d at 1057. Accordingly, "the number and nature of the undisclosed benefits was such that they would have impeached [the witness] more effectively" than the benefits that were disclosed. *Id.* at 1058. By contrast, in the present case the impeachment evidence that was disclosed was substantial: an agreement allowing Bolanos to plead guilty to second-degree burglary and receive immunity for the murder in exchange for his testimony. Finally, in *Benn* the prosecutor effectively downplayed the importance of the impeachment evidence in his closing argument. *Id.* (quoting prosecutor's argument that "[t]he reward he got was that in a 6 to 12 month sentence, he got six months instead of nine months. Big reward."). In this case, however, the prosecutor argued that the jury should view Bolanos' testimony critically, and the jury was so instructed. For these reasons, we conclude that *Benn* does not control our analysis here.

Here, the undisclosed benefits were not material because there is not a reasonable probability that the outcome of the trial would have been different if defense counsel had known about them. In making this judgment, we realize that Belmontes need not pass a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434, 115 S.Ct. 1555. "However, our fundamental concern remains whether there exists a reasonable probability that given disclosure of the evidence of benefits to[the witness], one or more members of the jury would have viewed [his] testimony in a different light." *Singh*, 142 F.3d at 1163. In this case, Bolanos was impeached with his immunity agreement, including the fact that the charges filed against him were substantially lower than the evidence would have warranted. The withheld evidence would not have added much, if anything. Moreover, Bolanos' testimony was corroborated by that of several other witnesses,

including disinterested witnesses like Lucy Flores and Barbara Murillo, who were not involved in the crime or related to the codefendants. Belmontes' testimony to the contrary was uncorroborated and did not hold up well under cross examination. Had Bolanos' testimony been less well-supported or the undisclosed benefits been greater, or had the prosecutor not urged and the judge not instructed the jury to view his testimony with suspicion, we might conceivably have reached a different conclusion. Nevertheless, given the extent of the corroborating evidence, the relative unimportance of the undisclosed benefits as compared to those that were disclosed, and the nature of the prosecutor's statement, we cannot say that the jury would have viewed Bolanos' testimony in a different light had it known that the prosecutor had helped him to quash his misdemeanor traffic offenses or obtain lighter punishment on them. In short, the undisclosed benefits do not undermine our confidence in the verdict. In these circumstances, we hold that the withheld evidence was not material, and the claim must, therefore, be denied.

3. Napue *Claim*

Belmontes also argues that the prosecution violated his due process rights by failing to correct Bolanos' false assertion that he had never been "busted" before. The prosecutor has an independent, constitutional duty to correct testimony he knows to be false. *Napue v. Illinois*, 360 U.S. 264, 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959); *N. Mariana Islands v. Bowie*, 243 F.3d 1109 (9th Cir.2001). If there is "any reasonable likelihood that the false testimony could have affected the judgment of the jury," the conviction must be set aside. *United States v. Agurs*, 427 U.S. 97, 103, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976).

The state argues that the prosecution had no duty to correct the record because defense counsel was notified of the drunk-driving arrest at a pretrial hearing. Whether defense counsel is aware of

the falsity of the statement is beside the point. The state overlooks the fact that the prosecutor's duty to correct false testimony arises, not simply out of a duty of fairness to the defendant, but out of "the free standing constitutional duty of the State and its representatives to protect the system against false testimony." *Bowie*, 243 F.3d at 1118. Therefore, regardless of whether defense counsel should have known that a state witness testified falsely, "[a] prosecutor's 'responsibility and duty to correct what he knows to be false and elicit the truth,' *Napue*, 360 U.S. at 269-70, 79 S.Ct. 1173, 3 L.Ed.2d 1217, requires [him] to act when put on notice of the real possibility of false testimony." *Id.*

The state also contends that the prosecution had no duty in this case because the word "busted" is ambiguous, and therefore Bolanos may not have testified falsely at all. We do not find the word "busted" to be ambiguous. *See Webster's New World Dictionary* 189 (3d college ed.1988) (defining "bust" as "to arrest"). In this case, the prosecutor knew that Bolanos had been "busted" twice before: once for DUI/hit-and-run and once for gun possession. He had an independent duty to correct the false testimony and elicit the truth.

If there were any reasonable likelihood that Bolanos' false testimony could have affected the judgment of the jury, we would be compelled to grant the petition with respect to this claim. Belmontes argues that a reasonable likelihood exists, pointing to the fact that the "first time I got busted" comment arose at a crucial part of defense counsel's cross-examination. Bolanos used this false statement to explain his prior inconsistent statements on two critical points: the length of time Vasquez spent in the house and the alleged knocking noise that Bolanos heard when he got out of the car to open the trunk. He stated that he was nervous when he made the prior inconsistent statements to the officer because he had never been busted before. The testimony that was inconsistent was important

because it tended to incriminate Belmontes and exculpate Vasquez by suggesting that McConnell was killed before Vasquez entered the house; it also was not directly corroborated by any other witness. Conceivably, if the jury knew that Bolanos had lied when trying to explain his prior inconsistent statements on these points, it could have concluded that Bolanos was lying about the timing and the knocking noise, either to please the prosecution or to protect Vasquez. The jury then would have been more likely to believe Belmontes' testimony that Vasquez was the actual killer.

Ultimately, however, we do not believe that Bolanos' false testimony regarding the absence of prior arrests could have affected the judgment of the jury. As we explained, his testimony regarding the events surrounding the murder was in most respects corroborated by independent witnesses. Furthermore, the most damaging testimony of the trial came from Belmontes himself. On cross-examination, Belmontes conceded that for his version of events to be true, Vasquez would have had to have come directly from the car to the door without attempting to open the trunk, and there is direct evidence to the contrary from a disinterested eyewitness. Moreover, Belmontes refused to say that he had seen or heard Vasquez hitting McConnell, and he could not explain how Vasquez would have had enough time to both murder McConnell and ransack the front bedroom. Finally, Belmontes, but not Vasquez, had blood sprinkled on his clothes and shoe. On this record, we hold that there is no reasonable likelihood that Bolanos' false testimony that his arrest in connection with the McConnell murder was "the first time I got busted" would have affected the judgment of the jury. We therefore deny relief on this claim.

B. Conflict of Interest

Belmontes contends that he was deprived of due process and the effective assistance of counsel due to a conflict of interest

arising from Schick's multiple prior representations of Vasquez. *See Cuyler v. Sullivan*, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). At the heart of the claim is the allegation that Schick, because of the conflict of interest, did not offer evidence of Vasquez's violent criminal history in support of his defense theory that Vasquez was the actual killer.[5] Belmontes argues that this evidence was relevant and admissible for two purposes: first, to show that Vasquez was, in fact, the actual killer; and second, to impeach Botanos' credibility by showing that his fear of retaliation by Vasquez caused him to place the blame on Belmontes, rather than on the true murderer.

1. Factual Background

During pretrial proceedings, Vasquez's attorney brought a motion to recuse Schick as counsel for Belmontes. The motion was based on the fact that Schick's law firm had represented Vasquez in a 1979 murder case; Vasquez's attorney feared that Schick had confidential information that he would use against Vasquez as part of his defense theory that Vasquez was the actual killer.[6] Schick opposed the motion and filed a declaration

---

5. Belmontes also argues that the trial judge independently violated his due process rights by failing to inquire adequately into the conflict and failing to advise Belmontes about the nature and consequences of the conflict. We do not address this claim because Belmontes cannot prevail on it without showing that Schick labored under an actual conflict of interest that adversely affected his defense, a showing Belmontes cannot make for the reasons explained hereafter. *Mickens v. Taylor*, 535 U.S. 162, 122 S.Ct. 1237, 152 L.Ed.2d 291 (2002) (extending *Cuyler* burden of proof to situations in which trial judge failed to inquire into conflict about which he knew or reasonably should have known).

6. Earlier, Vasquez's counsel had successfully moved to recuse Schick's investigator. This investigator had previously worked on Vasquez's 1979 murder case, and at the time of Belmontes' trial he worked part-time in the public defender's office, which represented Vasquez in the McConnell murder.

in which he stated: (1) the attorney who represented Vasquez in 1979 had since left the firm; (2) the case against Vasquez was dismissed prior to trial; (3) he himself had acquired no confidential communications from Vasquez; and (4) the case file had been destroyed eight months earlier. The trial judge held a hearing and, based on these facts, denied the motion. The judge asked Belmontes if he wished to retain Schick as his lawyer, knowing that Schick's firm had previously represented Vasquez. Belmontes said that he did.

In postconviction proceedings, Belmontes' attorneys learned that Schick's connection to Vasquez was, in fact, much more extensive than he had disclosed to either Belmontes or the trial court. Prior to entering private practice, Schick and the members of his criminal defense firm had worked at the local public defenders' office. There, Schick and the members of his firm represented Vasquez on three occasions in addition to the 1979 murder charge. In August 1974, Schick had himself represented Vasquez on a gun possession charge; he had helped Vasquez negotiate a guilty plea. In November 1974, Patrick Riddle, a partner in Schick's law firm, had represented Vasquez on a rape charge.[7] In January 1976, Douglas Jacobsen, the third partner in Schick's firm, had represented Vasquez in a purse-snatching case that went to jury trial. Schick did not notify Belmontes or the court of these incidents of representation even though he remembered them at the time of the recusal motion.

In 1994, Schick signed another declaration with respect to the conflict of interest claim. In that declaration, he averred that at the time of the recusal motion, he saw no relationship between any of Vasquez's prior cases and the McConnell murder. He asserted that his representation of Belmontes was not inhibited by his prior representation of Vasquez and that his loyalty to

---

7. Schick avers that he was not aware of this case at the time he represented Belmontes.

Belmontes was complete and undivided. Schick stated that he considered calling Vasquez as a witness and would have been prepared to cross examine him fully had he taken the stand. However, he also admitted that he did not investigate Vasquez's violent criminal history even though doing so would have been helpful to Belmontes' defense. Schick stated that he did not make a tactical decision not to pursue this investigation. He explained that his normal procedure is to investigate the criminal record of a potential witness; however, he did not consider Vasquez a potential witness until after he had entered a guilty plea.

Schick testified at his deposition that he knew that he had a continuing duty of loyalty to Vasquez, but he did not view Belmontes' defense as conflicting with that duty in any way. However, Schick admitted that he knew that the district attorney could revive the 1979 murder charge against Vasquez at any time (although he also stated that it never crossed his mind that the prosecution would do so as a result of any evidence Schick presented at Belmontes' trial). In addition, Schick recognized that even though Vasquez entered his guilty plea prior to Belmontes' trial, Vasquez had an ongoing liberty interest in being viewed as an aider and abettor in the McConnell murder, and not the actual killer.

2. Discussion

At the outset, we dispose of the state's procedural objections to the claim. The state first contends that the claim is unexhausted because Belmontes did not present to the California Supreme Court all of the facts underlying the claim. This argument fails because "new factual allegations do not render a claim unexhausted unless they 'fundamentally alter the legal claim already considered by the state courts.' " *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir.1994) (quoting *Vasquez v. Hillery*, 474 U.S. 254, 260, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)). Here,

although the additional facts add some evidentiary support to the claim, they do not "fundamentally alter" it. *See Weaver v. Thompson,* 197 F.3d 359, 364 (9th Cir.1999) (holding that jury misconduct claim was properly exhausted when petitioner presented incidents of improper jury contact that differed in number, but not in kind, from what was presented to state courts). The essential factual and legal theories are the same as those presented to the California courts. Therefore, Belmontes adequately exhausted the claim.

Next, the state argues that the claim is barred by the *Teague* nonretroactivity doctrine. *See Teague v. Lane,* 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989). The government bases this argument on the Supreme Court's recent statement that, as far as its own precedent is concerned, the question whether *Cuyler* extends to cases of successive representation is still open. *Mickens v. Taylor,* 535 U.S. 162, 122 S.Ct. 1237, 1246, 152 L.Ed.2d 291 (2002). However, we have held that circuit court holdings suffice to create a "clearly established" rule of law under *Teague. Bell v. Hill,* 190 F.3d 1089, 1091 (9th Cir.1999). In this circuit, it was well-established at the time that Belmontes' conviction became final that conflicts of constitutional magnitude can arise from cases of successive representation. *See, e.g., Mannhalt v. Reed,* 847 F.2d 576, 579 (1988); *United States v. Wheat,* 813 F.2d 1399, 1402 & n. 1 (9th Cir.1987), *aff'd on other grounds,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988). Accordingly, the conflict claim is not *Teague*-barred.

We also hold that Belmontes' purported waiver of the conflict of interest was invalid. "For a waiver to be knowing and intelligent, the defendant must have been sufficiently informed of the consequences of his choice." *Lockhart v. Terhune,* 250 F.3d 1223, 1232 (9th Cir.2001) (internal quotation marks and citations omitted). Here, Schick failed to inform Belmontes or the court of the extent of his prior relationship with Vasquez. In

addition, neither Schick nor the trial judge explained to Belmontes that Schick owed a continuing duty of loyalty to Vasquez, a duty that could potentially conflict with Belmontes' defense theory--that Vasquez was McConnell's actual killer. Under these circumstances, we conclude that Belmontes was not sufficiently informed of the consequences of his choice, and his waiver was therefore invalid. *See Lockhart,* 250 F.3d at 1232-33, citing *United States v. Curcio,* 680 F.2d 881 (8th Cir.1982) (holding that waiver was ineffective when the defendant was informed of possible conflict due to attorney's prior representation of codefendant and told that conflict may arise from prior confidential communications, but not told that conflict may arise from attorney's continued loyalty to codefendant).

To establish a Sixth Amendment violation based on conflict of interest, the defendant must show that an actual conflict of interest adversely affected his lawyer's performance. *Cuyler,* 446 U.S. at 338, 100 S.Ct. 1708; *Mannhalt,* 847 F.2d at 579. Generally, it is more difficult to demonstrate an actual conflict resulting from successive, rather than simultaneous, representation. *Mannhalt,* 847 F.2d at 580. Conflicts of interest based on successive representation may arise if the current and former cases are substantially related, if the attorney reveals privileged communications of the former client, or if the attorney otherwise divides his loyalties. *Id.* Ultimately, however, an actual conflict of interest is one "that affected counsel's performance--as opposed to a mere theoretical division of loyalties." *Mickens,* 122 S.Ct. at 1243. In other words, the simple "possibility of conflict is insufficient to impugn a criminal conviction." *Cuyler,* 446 U.S. at 350, 100 S.Ct. 1708.

We must decide whether the potential conflict of interest engendered by Schick's prior representation of Vasquez ripened into an actual conflict. We begin by noting that there is no suggestion that Vasquez's prior cases were substantially related

to the McConnell murder or that Schick was in possession of privileged communications from Vasquez. Therefore, if Belmontes is to demonstrate an actual conflict, he must show that Schick "divide[d] his loyalties" between Vasquez and Belmontes. *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir.1989), citing *Mannhalt*, 847 F.2d at 580. In engaging in this inquiry, we look beyond Schick's protestations to the contrary to see whether independent evidence in the record supports the allegation of divided loyalties. *United States v. Shwayder*, 312 F.3d 1109, 1119 (9th Cir.2002) ("Human self-perception regarding one's own motives for particular actions in difficult circumstances is too faulty to be relied upon, even if the individual reporting is telling the truth as he perceives it."); *Sanders v. Ratelle*, 21 F.3d 1446, 1452 (9th Cir.1994) ("The existence of an actual conflict cannot be governed solely by the perceptions of the attorney; rather, the court itself must examine the record to discern whether the attorney's behavior seems to have been influenced by the suggested conflict.").

After a careful examination of the record, we find no evidence that Schick divided his loyalties between Vasquez and Belmontes. Indeed, Belmontes' entire defense was that Vasquez was the killer. This case is thus distinguishable from cases like *Lockhart*, *Sanders*, and *Fitzpatrick*, all of which addressed situations in which defense counsel sabotaged their current clients' case by refusing to raise the obvious defense that a former client was actually responsible for the murder. *See Lockhart*, 250 F.3d at 1230-31 (where the evidence showed that the same person had committed both an earlier murder and the murder for which defendant was on trial, defendant's trial counsel refused to present evidence that his former client had committed the earlier murder); *Sanders*, 21 F.3d at 1453 (defense counsel successively represented two brothers who were accused of the same murder; the first brother confessed his guilt to defense counsel, who advised him to take the Fifth at his brother's trial; at the trial, defense counsel put forth an

unconvincing alibi defense rather than evidence that the first brother had committed the murder); *Fitzpatrick,* 869 F.2d at 1251-52 (defense counsel refused to present defense that a former client actually committed the murder; because of the prior attorney-client relationship, defense counsel believed in the former client's innocence to the detriment of his current client).

Belmontes argues nevertheless that an actual conflict of interest affected Schick's performance at his trial. According to Belmontes, even though Schick argued that Vasquez was the killer, he failed to support this theory with hard evidence. Belmontes asserts that Schick should have investigated Vasquez's lengthy criminal record and presented it as evidence that Vasquez was the actual killer. He also asserts that Schick should have impeached Bolanos by showing that he was in fear for his life due to death threats issued by Vasquez and thus had a powerful motive to falsely shift the blame from Vasquez to Belmontes. Belmontes argues that the only possible explanation for these lapses on Schick's part is that he felt bound by a continuing duty of loyalty to Vasquez, and that this duty required him to refrain from presenting evidence that could have resulted in the revival of the 1979 murder prosecution or impaired Vasquez's prospects for an early parole on his second degree murder conviction in the current case.

We are of the view, however, that these alleged failings are too speculative to sustain a conflict of interest claim. This is not a case in which Schick failed to present evidence that went directly to Vasquez's--and therefore Belmontes'--guilt or innocence. Rather, Schick sought squarely to place the blame on Vasquez, and did not overlook any direct evidence on that point. He simply failed to investigate and present evidence of Vasquez's prior bad acts, which, if admissible, might have marginally affected whether a jury would have had a reasonable doubt as to Belmontes' guilt. Given the absence of evidence suggesting that Vasquez was the actual killer and given the

damaging nature of Belmontes' own conflicting statements, any counsel might have failed to investigate and offer evidence regarding Vasquez's criminal history. In short, we hold that this failure, standing alone, is not enough to show that Schick divided his loyalties between Vasquez and Belmontes. It is not "likely" that a conflict caused Schick to handle Belmontes' case as he did. *See United States v. Miskinis*, 966 F.2d 1263, 1268 (9th Cir.1992). Thus, Belmontes has not shown that he was deprived of his Sixth Amendment rights by an actual conflict of interest.

C. Involuntary Statement

Belmontes argues that the prosecutor violated his due process rights by introducing into evidence his involuntary, inculpatory statements. However, Belmontes testified in his deposition that he spoke to the police freely and voluntarily. There was no due process violation here.

D. Counsel's Failure to Challenge Arrest Warrant

Belmontes claims that his trial counsel was constitutionally ineffective for failing to challenge his arrest warrant. He argues that the warrant in his case was facially insufficient to support a finding of probable cause because nothing in the warrant corroborated the allegation that Belmontes himself, as opposed to Bolanos, was involved in the crime.[8]

---

8. The warrant reads:

Detective Elbert Holman, San Joaquin County Sheriff's Office, will testify that: he responded to 17281 N. Sunrise St. Victor, CA on 3/15/81 in the early afternoon. The house was ransacked.

Deputy St. Sure will testify he was the first deputy Sheriff to arrive at 17281 N. Sunrise. Steacy McConnell was on the floor being administered to by medical personnel. Steacy McConnell subsequently died.

Dr. Madieros did the autopsy on Steacy McConnell. The cause of death was blunt trauma to the head.

Bob Bolanos, after being advised of his Miranda rights, waived those rights

1. Strickland *Claim*

In order to prevail on his ineffectiveness claim, Belmontes must show that: (1) his trial counsel's performance fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To satisfy *Strickland's* prejudice prong in a Fourth Amendment context, Belmontes must demonstrate a reasonable probability that a motion to suppress would have succeeded and that the suppression of the warrant would have led to a different out-come at the trial. *Kimmelman v. Morrison*, 477 U.S. 365, 375, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986). The reasonableness of counsel's performance is evaluated from counsel's perspective at the time of the alleged error. *See id.* at 384, 106 S.Ct. 2574.

At the time of Belmontes' trial, the federal *Aguilar-Spinelli*

---

and told Detective the following: That he went to the home of Domingo Vasquez, Jr. He was with Fernando Delmontes on 3/15/81. While at the Vasquez house, Vasquez called Steacy McConnell. Thereafter, the three of them talked about the fact that Steacy possessed some expensive property at her residence. Fernando Delmontes said he needed money to send to his wife in Los Angeles. Delmontes decided to burglarize the McConnell residence after Vasquez told them McConnell would not be home. Vasquez and Bolanos agreed to go with Delmontes. Bolanos drive them to McConnell's in his car. Upon arriving in the vicinity, Delmontes got out, carrying an iron bar he had brought with him from Vasquez's house.
Delmontes told Bolanos to wait in the car for 30 minutes, then to drive to McConnell's and get him.
When they drove to McConnell's, they opened the trunk, and Vasquez went into the house. Vasquez carried stereo speakers from the house to the car trunk. Delmontes followed Vasquez out with the receiver portion of the stereo. Delmontes was splattered with blood. Vasquez was not. Delmontes said McConnell was in the house, and when Bolanos drove up, he beat her with the iron bar. The stereo was later sold, and the proceeds divided.

test applied to affidavits supporting warrant applications. *Aguilar-Spinelli* did not require independent corroboration of the facts set forth in the affidavit. Rather, under *Aguilar-Spinelli*, the affidavit on its face had to provide enough information so that a magistrate could determine: (1) that the informant was reliable (the "veracity" prong); and (2) that his information was dependable (the "basis of knowledge" prong). *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969); *Aguilar v. Texas*, 378 U.S. 108, 114, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *United States v. Larkin*, 510 F.2d 13, 15 (9th Cir.1974). Under federal law, the affidavit met both prongs. Because the affidavit stated that Bolanos acquired his information through first-hand observation, it satisfied the "basis of knowledge" prong, *Aguilar*, 378 U.S. at 114, 84 S.Ct. 1509, and because it contained a statement against penal interest, it satisfied the veracity prong. *United States v. Harris*, 403 U.S. 573, 583-84, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971) (holding that, in most cases, statements against penal interest are inherently reliable); *but see United States v. Hall*, 113 F.3d 157, 159 (9th Cir.1997) (declining to apply *Harris* to accomplice informant because "once a person believes that the police have sufficient evidence to convict him, his statement that another person is more important to his criminal enterprise than he gains little credibility from its inculpatory aspect").

Nor would the claim have had a reasonable probability of success under California law. According to the California Supreme Court, the affidavit contained sufficient corroboration to support a finding of probable cause:

> The circumstances of the crime and evidence found at the crime scene--as summarized in the affidavit--corroborated Bolanos' statement.... [T]rial counsel could reasonably have concluded that the affidavit contained sufficient corroboration of Bolanos's hearsay statement; that the arrest warrant thus issued on probable cause; and that a de novo motion to quash

the warrant would have proved futile.

People v. Belmontes, 45 Cal.3d 744, 768, 248 Cal.Rptr. 126, 755 P.2d 310 (1988). We are bound by statements of the California Supreme Court as to California law. *See Estelle v. McGuire,* 502 U.S. 62, 67-68, 112 S.Ct. 475, 116 L.Ed.2d 385, (1991) ("[I]t is not the province of a federal habeas court to reexamine state court determinations on state law questions."). Accordingly, we must conclude that Schick would not have had a reasonable probability of success in challenging the arrest warrant. Thus his failure to challenge the warrant does not constitute ineffective assistance of counsel.

2. Franks *Claim*

Belmontes also alleges that material omissions in the affidavit caused the magistrate to issue a warrant for which there was no probable cause. *See Franks v. Delaware,* 438 U.S. 154, 156, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Under *Franks,* if a criminal defendant establishes by a preponderance of the evidence that an officer recklessly omitted material information from the affidavit, and if the affidavit considered with the omitted evidence is insufficient to establish probable cause, then the "warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking." *Id.*

On appeal, Belmontes did not specify what evidence was omitted from the warrant, but he did refer to the California Supreme Court opinion, which described four categories of evidence: (1) The affiant, a police officer, was familiar with Vasquez's violent history but did not know Belmontes; (2) Bolanos' car had been identified at the scene of the crime; (3) Bolanos offered his statement only after his car was impounded and his girlfriend had incriminated him; and (4) at first, Bolanos lied when speaking to the police. *Belmontes,* 45 Cal.3d. at 769, 248 Cal.Rptr. 126, 755 P.2d 310. Three of these omitted facts

cast aspersions on Bolanos' credibility because they highlight his strong motive to shift the blame for McConnell's death to someone else. The fourth is plainly of no relevance. As to the three, the face of the affidavit makes clear that Bolanos was *Mirandized,* which itself indicates that Bolanos was a suspect in the crime. The omitted details add more color to Belmontes' claims, but they do not change the basic calculus involved in determining Bolanos' reliability. Accordingly, they are not material, and the *Franks* claim must be denied.

E. Doyle *Claim*

Belmontes asserts that the prosecutor violated his due process rights by cross-examining him as to his post-arrest silence in violation of *Doyle v. Ohio,* 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976). However, the Supreme Court has held that *Doyle* does not apply to a defendant who has waived his *Miranda* rights and voluntarily given a statement to the police. *Anderson v. Charles,* 447 U.S. 404, 408, 100 S.Ct. 2180, 65 L.Ed.2d 222 (1980). Belmontes testified in his deposition that he understood his *Miranda* rights, waived them, and spoke freely and voluntarily to the police. No *Doyle* error occurred.

F. Unconstitutional Restriction on Cross Examination

Belmontes contends that the trial judge violated his Sixth Amendment rights by unconstitutionally restricting his cross examination of Karrie Lynn Vasquez, Vasquez's wife. Ms. Vasquez testified that she saw Belmontes take the iron bar from the kitchen and heard him admit to killing McConnell. Defense counsel sought to impeach her testimony by demonstrating that she was lying in order to increase Vasquez's chances at an early parole by emphasizing Belmontes' greater culpability. This strategy was foiled because the trial judge refused to allow defense counsel to question Ms. Vasquez as to her knowledge of the length of Vasquez's sentence.

The Confrontation Clause protects a defendant's right to cross examine witnesses as to potential bias. *Delaware v. VanArsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). However, the trial judge retains considerable latitude to impose reasonable limits on cross-examination based on harassment, prejudice, confusion of the issues, and relevance. *Id.* Any error is subject to harmless error review. *Id.* at 684, 106 S.Ct. 1431.

Despite the fact that the trial judge prevented defense counsel from exploring Ms. Vasquez's bias with respect to the length of Vasquez's sentence, defense counsel cross-examined her extensively and effectively. Defense counsel elicited testimony that Ms. Vasquez had known her husband for eight years, bore his child, stayed with him in spite of his frequent infidelity, married him while he was in prison for the McConnell murder, and visited him in jail every weekend. The jury thus had ample reason to believe that Ms. Vasquez was biased in favor of her husband. In addition, counsel forced Ms. Vasquez to admit that, although she had been questioned extensively during the police investigation, it was not until the day before Belmontes' trial that she first claimed to have heard him admit to the crime. This testimony strongly suggested that Ms. Vasquez was lying about what she claimed to have heard. Ms. Vasquez could not have been impeached much more effectively.

In light of the extensive and effective cross-examination that occurred, and the minimal amount of additional force the excluded material would have added, the error, if any, could not have had a substantial and injurious effect on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637-38, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Accordingly, we deny relief on this claim as well.

G. Evidentiary Errors

Belmontes argues that his trial was rendered fundamentally

unfair by the introduction of hearsay and double-hearsay statements supporting Bolanos' testimony that Belmontes was the actual killer. However, the California Supreme Court held that these statements were properly admitted prior consistent statements. We are bound by the opinion of the California Supreme Court in these matters of state law. *Estelle,* 502 U.S. at 67-68, 112 S.Ct. 475. As the Court has stated, "the Due Process Clause does not permit the federal courts to engage in a finely tuned review of the wisdom of state evidentiary rules." *Marshall v. Lonberger,* 459 U.S. 422, 438 n. 6, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983). Here, the statements added little and did not render the trial fundamentally unfair.

H. Instructional Error

Belmontes also challenges an instruction directing the jury not to speculate as to why other individuals involved in the crime were not on trial along with Belmontes. He claims that this instruction prevented the jury from considering the impact of Bolanos' immunity agreement on his credibility. We must determine "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Estelle,* 502 U.S. at 72, 112 S.Ct. 475 (internal quotation marks omitted). We conclude that it did not, because the jury was also instructed that it should view Bolanos' testimony with suspicion due to his involvement in the crime. Accordingly, we deny this claim also.

I. Fair Cross-Section

Belmontes alleges that he was deprived of a jury comprised of a fair cross-section of the community because of the systematic exclusion of minority jurors from the venire. However, he provides no statistical data in support of his claim. Belmontes' claim is thus barred by our decision in *Thomas v. Borg,* 159 F.3d 1147 (9th Cir.1998). In that case, the petitioner argued that we

should excuse his failure to provide the necessary statistical evidence because his trial counsel was constitutionally ineffective for failing to preserve it. *Id.* at 1150. We held:

> [F]or purposes of our fair cross-section analysis, the reason for Thomas' lack of evidence is immaterial. Because Thomas has provided us with insufficient statistical evidence to determine whether blacks were substantially underrepresented on jury venires or panels in Kern County at the time of his trial, his Sixth Amendment fair cross-section claim must be denied.

Id. at 1150-51. Applying *Thomas* to the facts of this case, we must deny the claim.

J. Jury Misconduct

Belmontes contends that the district court erred in denying him an evidentiary hearing on his juror misconduct claims. A habeas petitioner must meet two conditions to be entitled to a federal evidentiary hearing: He must (1) allege facts which, if proven, would entitle him to relief, and (2) show that he did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding. *Id.* at 1126-27. A petitioner who meets these conditions must receive a hearing. *See, e.g., Williams v. Taylor,* 529 U.S. 420, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (holding that because prisoner diligently pursued claim in state court, and was denied a hearing, he was entitled to a hearing in federal court); *United States v. Navarro-Garcia,* 926 F.2d 818, 822 (9th Cir.1991) ("Unless the court is able to determine without a hearing that the allegations are without credibility or that the allegations if true would not warrant a new trial, an evidentiary hearing must be held.").

Belmontes first asserts that the jurors based their decision on the view that "life without possibility of parole did not mean that Belmontes would spend the rest of his life in prison." Belmontes

is not entitled to relief on this claim because it concerns intrinsic jury processes. "[I]ntrinsic jury processes will not be examined on appeal and cannot support reversal." *United States v. Bagnariol,* 665 F.2d 877, 887 (9th Cir.1981).

Belmontes next alleges that the jurors had improper contacts with members of the victim's family. He bases this contention on an excerpt from the record in which the trial court reprimanded one of the jurors for talking to the victim's father about motorcycles. After the reprimand, the trial court conducted a hearing and determined that the juror was not biased as a result of his contact with the victim's father. Belmontes does not assert either that the hearing was not full or that it was not fair. Nor does he assert that he has any newly discovered evidence. Accordingly, he is not entitled to a federal evidentiary hearing on this claim.[9]

Third, Belmontes asserts that several jurors prejudged his guilt and engaged in premature deliberations. However, even assuming that the jurors did the latter, Belmontes would not necessarily be entitled to relief. *See, e.g., United States v. Klee,* 494 F.2d 394, 396 (9th Cir.1974) (denying motion for new trial even though jurors discussed the case during breaks and expressed premature opinions about the defendant's guilt). A petitioner must allege facts which, if proved, would show that the premature deliberations prejudiced him to the extent that he did not receive a fair trial. *United States v. Hendrix,* 549 F.2d 1225, 1229 (9th Cir.1977). Belmontes has not done so here;

---

9. Moreover, the state court's factual determination is subject to a presumption of correctness. *Patton v. Yount,* 467 U.S. 1025, 1037 n. 12, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); 29 U.S.C. § 2254(d) (1994). To overcome the presumption, Belmontes must establish by clear and convincing evidence that the state court's factual finding was erroneous. *Patton,* 467 U.S. at 1037 n. 12, 104 S.Ct. 2885. However, he submitted no evidence tending to overcome the presumption, and the record contains none.

indeed, he has not alleged any facts other than that premature deliberations took place.

As to the alleged juror prejudgment, in his Amended Petition for Writ of Habeas Corpus, Belmontes contends that "[a] sitting juror remarked, 'Here comes the killer,' whenever petitioner was brought into court." While this claim, if true, might possibly entitle him to relief, *see Dyer v. Calderon,* 151 F.3d 970, 973 (9th Cir.1998) (en banc) ("The bias or prejudice of even a single juror would violate [a criminal defendant's] right to a fair trial."), Belmontes did not include the issue in his request for an evidentiary hearing or present any facts that would entitle him to relief. Accordingly, the district court did not err in failing to afford him a hearing on that claim.

Because Belmontes has not alleged facts that, if true, would entitle him to relief, we affirm the district court's denial of an evidentiary hearing on his jury misconduct claims.

VI. SPECIAL CIRCUMSTANCES ISSUES

A. Racial Discrimination in Charging

Belmontes alleges that the charging decision in his case violated the Eighth Amendment and the Equal Protection Clause because it was infected by racial discrimination against defendants whose victims were white. In support of his claim, Belmontes relies on an expert report prepared by Richard Berk, a well-respected professor of sociology and statistics at the University of California, Los Angeles. Berk analyzed prosecutors' charging decisions in 122 death-eligible homicides committed in San Joaquin County from August 1977 through 1986.[10/] In order to describe accurately the role of race and

---

10. The data set consisted of probation department reports for all death-eligible homicides charged during the relevant time period, except 70

ethnicity in death penalty charging, he coded data for over 450 variables. After running numerous logistic regression tests, Berk concluded that the odds of being charged with special circumstances varied significantly according to the race of the victim. A defendant who killed a white person was five times more likely to be charged with special circumstances than a defendant who killed an African American and twenty times more likely to be charged than if the victim were Latino. Predictably, however, the government's experts reviewed Berk's report and the underlying data and opined that the data did not reveal a pattern of discriminatory charging in San Joaquin County. For the purposes of this opinion, we assume the accuracy and statistical validity of the Berk report.[11]

Belmontes' claim of discriminatory charging is essentially a selective prosecution claim, and we analyze it under that rubric. Selective prosecution doctrine, however, poses significant hurdles for Belmontes. The government retains broad discretion as to whom to prosecute. *Wayte v. United States,* 470 U.S. 598, 607, 105 S.Ct. 1524, 84 L.Ed.2d 547 (1985). Because the decision to prosecute is based on such factors as the strength of the case, the government's enforcement priorities, and the case's relationship to those priorities, the Supreme Court has stated that

---

cases for which the County lacked complete reports, 52 cases in which the defendants were not bound over for trial on murder charges, and six cases in which the defendants were female.

11. The district court questioned the relevance of the Berk report on the ground that Berk based his conclusions on "a model that used only four non-racial factors." Although the tables printed in the report contained only four non-racial variables, the report stated that Berk and his team actually considered many other variables in addition to those set forth in the tables. In his declaration, Berk characterized the small, six-variable model as "simply a summary" and stated that he considered all the variables in the data set, which included many non-racial factors. We have no reason to disbelieve Berk's sworn statement and can only conclude that the district court was mistaken.

such decisions are "particularly ill-suited to judicial review." *Id.* at 607, 105 S.Ct. 1524. Therefore, a presumption of regularity supports prosecutorial judgments, and "in the absence of clear evidence to the contrary, courts presume that [prosecutors] have properly discharged their official duties." *United States v. Armstrong,* 517 U.S. at 463, 464, 116 S.Ct. 1480 (1996) (quoting *United States v. Chem. Found., Inc.,* 272 U.S. 1, 14-15, 47 S.Ct. 1, 71 L.Ed. 131 (1926)). "So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." *Bordenkircher v. Hayes,* 434 U.S. 357, 364, 98 S.Ct. 663, 54 L.Ed.2d 604 (1978).

Yet, there is a line the prosecution may not cross. Although prosecutorial discretion is broad, it is not unlimited. *United States v. Batchelder,* 442 U.S. 114, 125, 99 S.Ct. 2198, 60 L.Ed.2d 755 (1979). Rather, "a prosecutor's discretion is 'subject to constitutional constraints.' " *Armstrong,* 517 U.S. at 464, 116 S.Ct. 1480 (quoting *Batchelder,* 442 U.S. at 125, 99 S.Ct. 2198). The decision to prosecute may not be based upon an unjustifiable standard such as race, religion, or other arbitrary classification, including the exercise of protected statutory and constitutional rights. *Armstrong,* 517 U.S. at 464, 116 S.Ct. 1480; *Wayte,* 470 U.S. at 608, 105 S.Ct. 1524. Likewise, the decision to charge the death penalty cannot rest on criteria that offend the Constitution. *McCleskey v. Kemp,* 481 U.S. 279, 293, 107 S.Ct. 1756 (1987); *Adamson v. Ricketts,* 865 F.2d 1011, 1022-23 (9th Cir.1988) (en banc), *abrogated on other grounds, Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), *overruled, Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

In order to prevail on a selective prosecution claim, a defendant must show that the prosecutorial policy both had a discriminatory effect and was motivated by a discriminatory purpose. *Armstrong,* 517 U.S. at 465, 116 S.Ct. 1480; *see also*

McCleskey, 481 U.S. at 292, 107 S.Ct. 1756 ("[T]o prevail under the Equal Protection Clause, [a defendant] must prove that the decisionmakers in *his* case acted with discriminatory purpose."). To establish a discriminatory effect in a race discrimination case, a defendant must prove that similarly situated individuals of a different race, or whose victims were of a different race, were not prosecuted. *Armstrong*, 517 U.S. at 467, 116 S.Ct. 1480.[12]

We reject the government's contention that the Supreme Court rejected similar statistical evidence in *McCleskey v. Kemp*, and that Belmontes' statistics are therefore "insufficient as a matter of law." The factual showing made by McCleskey was materially different from the showing made in this case. In *McCleskey*, the Supreme Court reviewed the claim of a Georgia prisoner who alleged that the Georgia capital sentencing statute violated the Equal Protection Clause because it was administered in a racially discriminatory manner. 481 U.S. at 286, 107 S.Ct.

---

12. In *Armstrong*, the Supreme Court stated that [t]o establish a discriminatory effect in a race case, the claimant must show that similarly situated individuals *of a different race* were not prosecuted. 517 U.S. at 465, 116 S.Ct. 1480 (emphasis added). Belmontes' statistics do not meet this showing. Nevertheless, although Belmontes' claim is based on the race of his victim, not his own race, we do not read this sentence as barring our review. In *McCleskey*, the court examined a statistical study that showed statistical disparities according to the race of the victim. 481 U.S. at 286-87, 107 S.Ct. 1756. In that case, the State argued that McCleskey did not have standing to raise a discrimination claim based on his victim's race. *Id.* at 291 n. 8, 107 S.Ct. 1756. The Court concluded that McCleskey did have standing to raise this claim, *id.*, and it addressed directly McCleskey's argument that he was "discriminated against ... because of the race of his victim." *Id.* at 292, 107 S.Ct. 1756. *Armstrong* did not discuss the issue of the victim's race at all, nor did the majority opinion even mention *McCleskey*. That question was simply not before the Court. In short, we are confident that *Armstrong* did not intend to overrule the pertinent portion of *McCleskey*. Accordingly, we conclude that a defendant may bring a selective prosecution claim based solely on the race of his victim, and that to establish a discriminatory effect in a race-of-the-victim case, he must show that similarly situated individuals whose victims were of a different race were not prosecuted.

1756. In support of his claim, McCleskey offered a sophisticated statistical study that demonstrated that Georgia defendants whose victims were white were 4.3 times as likely to receive a death sentence as those whose victims were black. *Id.* The Court denied his claim, holding that McCleskey's statewide statistics did not meet his burden of proving that the imposition of the death penalty in his particular case was the product of purposeful discrimination. *Id.* at 293, 107 S.Ct. 1756. We have similarly refused to allow petitioners in California and Arizona to submit statistics that demonstrated racial disparities in the imposition of the death penalty statewide as evidence of discrimination in an individual case. *See Carriger v. Lewis,* 971 F.2d 329, 334 (9th Cir.1992) (en banc) (Arizona); *Harris v. Pulley,* 885 F.2d 1354, 1374-75 (9th Cir.1989) (California). Unlike McCleskey, Carriger, and Harris, however, Belmontes offered statistics that provided information limited to the charging entity--the San Joaquin County District Attorney's Office--and its death penalty charging practices over time. Thus he provided what the statistics in *McCleskey* lacked: information specific to the decisionmaker in his case. We conclude that statistics relating to the charging entity, such as those presented by Belmontes, are materially more probative of discrimination in capital charging than those considered by the Supreme Court in *McCleskey. See United States v. Bass,* 536 U.S. 862, 122 S.Ct. 2389, 2389, 153 L.Ed.2d 769 (2002) (approving of "a showing regarding the record of the decisionmakers in respondent's case"). Thus, Belmontes' proffered statistics are not barred by *McCleskey* and may support a prima facie showing of unlawful charging discrimination.

We next confront the question whether Belmontes' proffered statistical evidence proves a "discriminatory effect" under *Armstrong.* The statistics show that defendants whose victims were white were charged with special circumstances 30% of the time, whereas similarly situated defendants whose victims were African American or Latino were charged with special

circumstances only 19% and 6% of the time, respectively. Because Belmontes' statistics revealed that individuals whose victims were white were far more likely to be charged with a capital offense than similarly situated individuals whose victims were non-white, we conclude that Belmontes established the requisite discriminatory effect. *See id.* (approving of statistical evidence that assesses whether similarly situated individuals were treated differently).

Under *Armstrong,* however, a discriminatory effect is not enough; Belmontes must also show that the decisionmakers in his case acted with a discriminatory purpose. *Armstrong,* 517 U.S. at 465, 116 S.Ct. 1480. Here, Belmontes must show that the San Joaquin County District Attorneys Office pursued a death sentence in his case "at least in part because of" the race of his victim. *Wayte,* 470 U.S. at 610, 105 S.Ct. 1524 (internal quotation marks omitted). Because Belmontes offered no non-statistical evidence on this point, we must decide whether his statistical evidence constitutes a prima facie showing of an intent to discriminate on the part of San Joaquin County District Attorney's Office.

The Supreme Court has not determined whether statistics relating exclusively to the prosecuting authority are sufficient, standing alone, to establish a prima facie claim of discriminatory intent in a capital charging case. On the one hand, the Court "has accepted statistics as proof of intent to discriminate in certain limited contexts," *McCleskey,* 481 U.S. at 293, 107 S.Ct. 1756, and has held that appropriate statistics may be enough to establish a prima facie case in a number of circumstances, including challenges to the composition of the jury venire, *id.,* Title VII employment discrimination, *id.* at 294, 107 S.Ct. 1756, legislative redistricting, *Hunt v. Cromartie,* 526 U.S. 541, 548-49, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999), and contemporaneous challenges to a prosecutor's acts. *See, e.g., Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69

(1986). In addition, the Court has recently reaffirmed *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), in which the petitioner, a Chinese laundry owner, relied entirely on statistics to prove that the City of San Francisco engaged in purposeful discrimination. *See, e.g., Armstrong*, 517 U.S. at 464-65, 116 S.Ct. 1480; *McCleskey*, 481 U.S. at 293 & n. 12, 107 S.Ct. 1756. On the other hand, the Court has held that statistical evidence, standing alone, is not enough to make out a prima facie case of discrimination with respect to a jury's verdict. *See McCleskey*, 481 U.S. at 294-96 & 295 n. 14, 107 S.Ct. 1756. Although language in *McCleskey* suggests the "impropriety" of requiring a prosecutor to explain his charging decision years after it was made, *id.* at 296 & n. 17, 107 S.Ct. 1756, the Court acknowledged that, generally, when a petitioner makes out a prima facie case of discrimination, a prosecutor must provide an explanation. *Id.* & n. 18.[13]

While we think that Belmontes' statistics provide a strong showing of intentional discrimination, we need not decide whether, in a discriminatory charging case, statistics standing alone can make out a prima facie case. Assuming *arguendo* that they can and that Belmontes has made out a prima facie case, here the State has provided evidence that is sufficient to overcome that showing. In his deposition, the prosecutor stated that when he decided to pursue a death sentence against Belmontes, he had reason to believe that prior to the McConnell murder Belmontes had shot and killed Jerry Howard. In short, the prosecutor asserted that he pursued a death penalty against

---

13. We note that a decision to charge a capital rather than a non-capital offense is far more significant and important than a decision to challenge a particular juror. A charging decision is made with great deliberation over a period of time and is generally the product of a deliberative process involving more than one person. Moreover, unlike the case of a juror challenge, there is a full record of the relevant events that ordinarily contains all of the objective factors upon which the decision-making would have been based.

Belmontes, not because of McConnell's death alone, but because he believed that Belmontes had actually committed more than one murder. Moreover, the evidence in the record is sufficient to provide a good faith basis for such belief. Thus, there appears to be a legitimate, race-neutral reason for a prosecutor to seek a death sentence in this particular case, and therefore sufficient evidence to rebut the inference of discrimination raised by Belmontes' statistical study. More important, Belmontes does not challenge the state's assertion that the prosecutor's explanation is sufficient to rebut his prima facie case. In his brief, he does not contend that the fact that a defendant is a double murderer is not a valid reason for seeking the death penalty; nor does he argue that the statistics show that racial disparity exists with respect to cases in which the defendant has killed, or is believed to have killed, more than one victim. Accordingly, we conclude that, even if Belmontes' statistics were sufficient to raise a prima facie case of purposeful discrimination, the State has successfully rebutted it by offering the prosecutor's legitimate, race-neutral explanation for his actions. We therefore deny the racial discrimination in charging claim.

B. Arbitrariness and Capriciousness in Charging

Belmontes also argues, independent of his discrimination claim, that the charging of special circumstances in his case was so arbitrary and capricious that it violated the Eighth Amendment. According to Belmontes, his crime was one of the least aggravated of death-eligible crimes, yet he was one of only a very few defendants to actually receive the death penalty. In contrast, many defendants who committed far more heinous crimes than he obtained lesser punishments. According to Belmontes, this disparity shows that in San Joaquin County at the time of his trial there was "no meaningful basis for distinguishing the few cases in which[a death sentence] is imposed from the many cases in which it is not." *Furman v. Georgia*, 408 U.S. 238, 313, 92 S.Ct. 2726, 33 L.Ed.2d 346

(1972) (White, J., concurring). Belmontes argues that because the death penalty regime under which he was charged, convicted, and sentenced is indistinguishable from that struck down in *Furman*, his sentence must be vacated as unconstitutionally arbitrary and capricious.

Belmontes' claim, however, although styled as one of arbitrary death penalty charging, is actually a claim of arbitrary *imposition* of the death penalty. He does not argue that the prosecutor's decision to *charge* him with special circumstances was arbitrary and capricious. Rather, he contends that it was arbitrary and capricious to impose the death penalty on him because other defendants who had committed more heinous crimes than he did not receive the death penalty. The Supreme Court considered and rejected this claim in *McCleskey*. 481 U.S. at 306-12, 107 S.Ct. 1756. As we are bound by controlling precedent, we must do the same.

VII. PENALTY PHASE ISSUES

A. Instructional Error

Belmontes contends that the trial judge's instructions to the jury prevented it from considering nonstatutory mitigating circumstances relating to the likelihood that he would live a constructive life in prison and make positive contributions to others if granted life without the possibility of parole. Because we conclude that there is a reasonable probability that as a result of instructional error the jury did not consider constitutionally relevant mitigating evidence, and because we believe that the error was not harmless, we grant the petition with respect to the sentencing phase.

1. Factual Background

At Belmontes' trial, the judge gave the jury the then-standard

model jury instructions, modified to eliminate four factors that the prosecution and defense agreed had no relevance to the case. The jury was therefore instructed:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable:
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
> (b) The presence or absence of any criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
> (c) The presence or absence of any prior felony conviction.
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (e) Whether or not the defendant acted under extreme duress or the substantial domination of another person.
> (f) The age of the defendant at the time of the crime.
> (g) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.[14]

The judge also gave the jury half of a supplemental instruction requested by the defense. The part that was given read:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of

---

14. To remain consistent with the text of the statute and the Supreme Court's terminology in *Boyde*, we will refer to this factor as "factor (k)" or "unadorned factor (k)."

the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

The other half of the instruction, which the trial judge refused to give, stated: "[Y]ou should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances ... as reasons for not imposing the death sentence."

After several hours of deliberations, the jury sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The jury was brought back to the courtroom, and the judge reread a portion of the jury instructions, emphasizing that "all 12 jurors must agree, if you can." The jurors asked again what would happen if they could not agree, but the court refused to tell them.

The judge asked the jury: "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" The jurors agreed that they needed more time to deliberate. They then asked the following series of questions:

JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?
THE COURT: That was the listing, yes, ma'am.
JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?
THE COURT: That is right. It is a balancing process. Mr. Meyer?
JUROR MEYER: A specific question, would this be an

either/or situation, not a one, if you cannot the other [*sic*]?
THE COURT: No. It is not that.
JUROR MEYER: It is an either/or situation?
THE COURT: Exactly. If you can make that either/ or decision. If you cannot, I will discharge you.
JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?
THE COURT: That is something you cannot consider in making your decision.

2. Discussion

The California death penalty statute has a unique mechanism for guiding the jury's discretion. Instead of separate sets of aggravating and mitigating circumstances, the statute features an eleven-factor test which focuses the jury's attention on the specifics of the crime and the background and character of the defendant. *Tuilaepa v. California*, 512 U.S. 967, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994); Cal.Penal Code § 190.3. The first ten factors instruct the jury to evaluate various circumstances of the crime and the defendant's age and prior convictions. *See* Cal.Penal Code § 190.3. The jury itself decides whether these factors are aggravating or mitigating. *People v. Benson*, 52 Cal.3d 754, 802, 276 Cal.Rptr. 827, 802 P.2d 330 (1990). The eleventh factor-- factor (k)--is intended to function as a catch-all that will enable the jury to consider any relevant mitigating circumstance that the defendant proffers as a basis for a sentence less than death. The jury is obligated to weigh and balance the aggravating and mitigating circumstances and must impose the death penalty if it determines that the circumstances in aggravation outweigh those in mitigation. *See* Cal.Penal Code § 190.3.

In this statutory scheme, the importance of factor (k) cannot be overstated. The Eighth Amendment requires that a capital jury

consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate. *Penry v. Johnson*, 532 U.S. 782, 797, 121 S.Ct. 1910, 150 L.Ed.2d 9 (2001); *see also Eddings v. Oklahoma*, 455 U.S. 104, 114-15, 102 S.Ct. 869, 71 L.Ed 2d 1 (1982) ("The sentencer ... may determine the weight to be given relevant mitigating evidence. But [it] may not give it no weight by excluding such evidence from [its] consideration."); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (holding that the Eighth Amendment requires that the sentencer consider "*as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). This broad mandate includes the duty to consider mitigating evidence that relates to a defendant's probable future behavior, especially the likelihood that he would not pose a future danger if spared but incarcerated. *Skipper v. South Carolina*, 476 U.S. 1, 4-5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986). Factor (k) provides the only mechanism for allowing the jury to consider a substantial portion of many defendants' mitigating evidence--indeed, all mitigating evidence that does not relate to the circumstances of the crime or the defendant's age and criminal record.

To pass constitutional muster, the trial judge's instructions must convey to the jury that factor (k) compels it to consider all relevant mitigating evidence proffered by the defendant as a basis for a sentence less than death. "[I]t is not enough simply to allow the defendant to present mitigating evidence to the sentencer." *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Rather, the trial judge's instructions must convey "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan v. Angelone*, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998), citing *Penry*, 492 U.S. at 317-18, 109 S.Ct. 2934;

Eddings, 455 U.S. at 113-14, 102 S.Ct. 869; *Lockett,* 438 U.S. at 604, 98 S.Ct. 2954.

At the time of Belmontes' trial, factor (k) allowed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The Supreme Court had occasion to review this language in *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990). In *Boyde,* the defendant had argued that the jury instruction was unconstitutional because there was a reasonable likelihood that the jury would construe the instruction as forbidding it from considering evidence unrelated *to the crime*--e.g., mitigating evidence relating to the defendant's background and character. However, the Supreme Court held that because of the view "long held by society" that a defendant with a disadvantaged background or emotional or mental problems may be "less culpable than defendants who have no such excuse," the jury was reasonably likely to have understood that the defendant's evidence of "his impoverished and deprived childhood, his inadequacies as a school student, and his strength of character in the face of these obstacles" could have "extenuate[d] the gravity of the crime even though it [wa]s not a legal excuse for the crime." *Id.* at 381- 82 & n. 5, 110 S.Ct. 1190. The Court held that, because the trial judge instructed the jury that it "*shall consider all of the evidence* which has been received during any part of the trial of this case," there was no reasonable likelihood that the jury believed that factor (k) prevented it from considering the background and character evidence introduced by Boyde and its bearing on Boyde's commission of the crime. *Id.* at 383, 110 S.Ct. 1190 (emphasis in original).[15/] In other words, the Supreme Court held that the unadorned factor (k), at least when accompanied by an appropriate clarifying instruction, was constitutional as applied

---

15. The Court also defined "extenuates" to mean "lessens the seriousness of a crime as by giving an excuse." *Id.* at 381, 110 S.Ct. 1190.

to mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense.

The same type of evidence, however, can serve an alternative forward-looking purpose, mitigating in a manner wholly unrelated to a petitioner's culpability for the crime he committed. This alternative purpose has nothing to do with persuading the jury that the defendant is *less culpable* with respect to the crime because of some aspect of his family background, personal history, character, or mental capacity. Rather, as defined by the Supreme Court in *Skipper v. South Carolina,* the jury must "consider[ ] a defendant's past conduct as indicative of his *probable future behavior* " and "draw[ ] favorable inferences" about a defendant's "probable future conduct if sentenced to life in prison." 476 U.S. at 4-5, 106 S.Ct. 1669(emphasis added).[16] The Court characterized this kind of mitigation as "an inevitable and not undesirable element of criminal sentencing" and stated that, even though these kinds of inferences "would not relate

---

16. In attempting to extend *Boyde* to issues of future conduct, the dissent errs by focusing on the temporal nature of the evidence rather than the purpose for which it is introduced. In the instant case, the operative distinction is not between categories of "pre-crime" and "post-crime" evidence in the sense of when the acts that constitute the evidence occurred, but rather between a jury's *use* of background and character evidence to mitigate culpability for the crime, as opposed to the use of the same type of evidence to draw favorable inferences about petitioner's probable future conduct. This latter use of the evidence can, as *Skipper* holds, serve as a wholly separate and independent basis for a sentence less than death. Thus, the central question is not whether the jury "was able to consider and give effect to *all* of Belmontes' mitigating evidence," *post* at 1142 (emphasis added), but rather *what mitigating effect* the jury understood to be permissible under the instruction as stated. *Skipper* requires that the jury understand that evidence must be given mitigating effect whether it bears on petitioner's culpability for the crime *or instead* relates to petitioner's future potential for constructive conduct.

specifically to petitioner's culpability for the crime he committed, *there is no question but that such inferences would be mitigating* in the sense that they might serve as a basis for a sentence less than death." *Id.* at 4-5, 106 S.Ct. 1669 (emphasis added) (citations and internal quotation marks omitted). Accordingly, the Court held that "[u]nder *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Id.* at 5, 102 S.Ct. 869. The Court's opinion in *Boyde* did not address whether a reasonable jury would have interpreted the unadorned factor (k) instruction to include the use of this same type of evidence for a forward-looking purpose which serves to mitigate without ameliorating the crime. *Boyde*, 494 U.S. at 382 n. 5, 110 S.Ct. 1190 (distinguishing *Boyde* from *Skipper* on the ground that Boyde's mitigation evidence "was introduced not to demonstrate that he was a 'model prisoner' like Skipper and therefore unlikely to present a risk of future dangerousness but ... as part of petitioner's overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties.").

Belmontes contends that his Eighth and Fourteenth Amendment rights were violated because the trial judge's instructions failed to advise the jury to consider the portion of his mitigating evidence that tended to show that he would adapt well to prison and would become a constructive member of society if granted a life sentence. We review this claim of instructional error under the approach set forth by the Supreme Court in *Boyde*, which directs us to determine whether there is a reasonable likelihood that the jury understood the instruction in a manner that resulted in its failure to consider constitutionally relevant evidence. 494 U.S. at 380, 110 S.Ct. 1190. Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hern,[17] the Court has held that we must

---

17. We reject the government's argument that the mid-deliberation exchange does not count as a jury instruction because it was "rather

examine claims of instructional error in light of the record as a whole. *Id.* at 377, 110 S.Ct. 1190. Accordingly, in assessing Belmontes' claim of instructional error, we consider the entire mid-deliberation colloquy as well as the original jury instructions.

We begin with the original instructions. As stated above, Belmontes' jury was instructed to consider and take into account "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Cal.Penal Code § 190.3.[18] Most naturally read, this instruction allows the jury to consider evidence that bears upon the commission of the crime by the defendant and excuses or mitigates his culpability for the offense. We now know that such evidence includes background and character, both of which tend to explain why the defendant committed the crime. By its plain

---

informal" and occurred after the formal charge. *See Shafer v. South Carolina*, 532 U.S. 36, 121 S.Ct. 1263, 1274, 149 L.Ed.2d 178 (2001) (labeling the trial judge's answer to the jury's mid-deliberation question an "instruction" and criticizing it because it "did nothing to ensure that the jury was not misled"); *Bollenbach v. United States*, 326 U.S. 607, 66 S.Ct. 402, 90 L.Ed. 350 (1946) (reversing and remanding because a "supplemental instruction" from the trial court following a question by the jury was "simply wrong"); *McDowell v. Calderon*, 130 F.3d 833, 836 (9th Cir.1997) (en banc), *overruled in part on other grounds, Weeks v. Angelone*, 528 U.S. 225, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000) (explaining that the trial judge's duty to instruct the jury adequately "continues until a verdict is reached and returned. As they work towards a verdict, the jurors must stay in the channel charted for them by state law. To this end, they may need ongoing guidance.").

18. The California legislature has since reformulated the instruction to direct the jury to consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." CALJIC 8.85(k) (6th ed.1996). *See also People v. Easley*, 34 Cal.3d 858, 196 Cal.Rptr. 309, 671 P.2d 813 (1983) (recognizing that unadorned factor (k) had significant potential for jury confusion.).

language, however, the instruction does not encompass events or considerations that are unrelated to the defendant's culpability. In particular, the instruction does not apply to those forward-looking considerations encompassed by the Supreme Court's decision in *Skipper:* evidence that allows the jury to evaluate the defendant's probable future conduct if incarcerated for life without the possibility of parole-- specifically, evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment. These important sentencing considerations are simply not in any respect "circumstance[s] that extenuate[ ] the gravity of the crime." *See Skipper,* 476 U.S. at 4, 106 S.Ct. 1669 (stating that lack of future dangerousness does "not relate specifically to petitioner's culpability for the crime he committed"); *see also Boyde,* 494 U.S. at 382 n. 5, 110 S.Ct. 1190. Moreover, unlike in *Boyde,* "society" has not had a "long held view" that a defendant's likely future conduct can serve to mitigate or excuse his commission of a serious crime. Rather, the doctrine is a legal concept peculiar to capital punishment cases. Thus, in the absence of a clear instruction on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor.

In the current case, the most important part of Belmontes' mitigation presentation was that the jury should spare his life because he had the potential, if confined within a prison setting, to contribute positively to prison life. Although the record made before the jury included a substantial amount of evidence about his difficult childhood, in his own testimony he repeatedly stated that he did not want to use his rough childhood "as a crutch" or an excuse. Thus, ultimately the more significant evidence related to his conduct during the period of his prior CYA incarceration and to his ability to conform his behavior to societal norms should he be confined within a structured prison

environment. Belmontes' counsel argued to the jury that the evidence demonstrated that if granted life without parole, he would adapt well to prison life, would make a positive contribution to the welfare of others, and would not pose a future danger to the guards or the other inmates.

Unlike the background and character evidence in *Boyde* that tended to mitigate the offense, Belmontes' mitigation evidence was simply not covered by any natural reading of the words of the unadorned factor (k) instruction. To the contrary, that instruction, read most naturally, suggested to the reasonable juror that Belmontes' evidence tending to show his probable future good conduct should be excluded from consideration, and thus that such evidence was governed by the earlier instruction that the jury "consider all of the evidence ... except as you may be hereafter instructed." At the least, the unadorned factor (k) instruction is ambiguous with respect to *Skipper's* requirement that the jury be permitted to consider and give effect to evidence bearing on a defendant's probable future good conduct when it decides whether to impose the death penalty, *see* 476 U.S. at 5, 106 S.Ct. 1669, and thus with respect to the jury's right to consider Belmontes' most important mitigating evidence.

The court's supplemental instructions only exacerbated this problem. Belmontes' counsel had requested instructions that would have expressly instructed the jury that it "should not limit [its] consideration of mitigating circumstances to these specific factors," i.e., the factors listed in the original instruction. However, although the trial judge gave part of the instruction requested by defense counsel, he refused to give the most critical portion. Instead, the trial judge gave a set of contradictory instructions that failed to inform the jury that it could consider the portion of Belmontes' mitigating evidence bearing on his probable future conduct. The trial judge started out on the right track by instructing the jury that it should view the statutory factors "merely as examples of some of the factors" that it could

consider. However, any clarity gained at the outset of the instruction was immediately undone by a superceding qualifying directive. The judge added, "You should pay careful attention to each of these factors," an instruction that a reasonable juror would almost certainly have understood to refer to the statutory factors, and particularly to the unconstitutionally limiting unadorned factor (k). The trial judge then continued, "Any one of them [i.e., the factors] standing alone may support a decision that death is not the appropriate punishment in this case," implying that only a statutory factor can support a sentence less than death. A juror who followed these instructions would likely think that he could not consider nonstatutory mitigating evidence--evidence not going to culpability--such as testimony tending to show that Belmontes would lead a constructive life if confined permanently within a structured environment. Still, the supplementary instructions did not end the matter.

Compounding the problems with the original and supplemental instructions were the trial judge's responses to the jurors' questions during the mid-deliberation colloquy. In that colloquy, the trial judge again directed the jury's attention to the literal text of the original unadorned factor (k) instruction, which strongly implied that the jury could not consider evidence regarding the defendant's probable future conduct. The jury had deliberated for several hours before it sent the judge a note indicating that it was deadlocked. The note read, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" In the discussion that followed, the judge properly ascertained that further deliberations would probably be fruitful. He then suggested to the jury that it might be helpful to "go over the instructions again with one another" as they continued to deliberate. It was at this point that the jurors began to question the judge with respect to the aggravating and mitigating factors. Juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that was the listing?" When the court responded affirmatively, she asked,

"Of those certain factors we were to decide one or the other and then balance the sheet?"

Juror Hern's questions reveal that she did not understand that her duty as a juror was to consider all of Belmontes' mitigating evidence. The most reasonable way to interpret her first question is as an effort to clarify that the jury should look to the statutory factors (a) through (g) [or unadorned (k)], as read to the jury by the trial judge, to determine what counted as aggravating and mitigating circumstances. It appears that by asking, "that was the listing?," Juror Hern wanted confirmation that there was a finite list of factors for the jury to consider and that the list consisted of the statutory factors read to the jury by the judge. This interpretation is reinforced by Juror Hern's next question: "Of those certain factors, we were to decide one or the other [e.g., whether the evidence is aggravating or mitigating] and then balance the sheet?" The structure of this question separates the "certain factors" that appear in "the listing" from other factors that may not be reflected there. It makes it clear that at least one juror believed that the jury should consider, weigh, and balance only "those certain factors" that appeared in "the listing." Of course, such a belief would have been incorrect; the jury was required to consider and evaluate Belmontes' mitigating evidence relating to his potential adjustment to life in prison regardless of the fact that it was not listed in the statute.

In any event, Juror Hern's questions signified that she was not sure how to follow the judge's instructions.[19] "When a jury

---

19. The Supreme Court has frequently accepted jury questions as evidence that the trial judge's original instructions were not sufficiently clear. *See, e.g., Shafer,* 121 S.Ct. at 1273 ("Shafer's jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means."); *Simmons v. South Carolina,* 512 U.S. 154, 178, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994) ("[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-

makes explicit its difficulties a trial judge should clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612-13, 66 S.Ct. 402, 90 L.Ed. 350, (1946). In this case, the trial judge had a duty to cure any ambiguity in his instructions by providing a clear description of the jury's obligations. The judge should have answered Juror Hern's questions by instructing the jury that "the listing" of mitigating factors was not exhaustive and that the jury's duty was to consider and weigh all of the mitigating evidence presented by Belmontes during the sentencing phase. *Cf. Boyde,* 494 U.S. at 383, 110 S.Ct. 1190. Instead, however, the judge simply affirmed Juror Hern's incorrect assumptions with a terse, "That is right." In so doing, he not only failed to correct Juror Hern's erroneous view, but he likely left all the jurors with the impression that they could consider mitigation evidence only if

---

sentenced defendant will be released from prison."); *Bollenbach,* 326 U.S. at 612, 66 S.Ct. 402 ("The jury's questions ... clearly indicated that the jurors were confused."). We have done so as well. *E.g., Morris v. Woodford,* 273 F.3d 826, 840 (9th Cir.2001) (citing fact that jury asked mid-deliberation question as evidence that it was confused by the original instruction); *United States v. Frega,* 179 F.3d 793 (9th Cir.1999) (stating that a reviewing court may infer from the jury's questions that it was confused about a controlling legal principle). Here, as in those cases, Juror Hern's questions strengthen our conviction that the original and supplemental instructions did not convey to the jury that it could consider Belmontes' nonstatutory mitigating evidence pertaining to his probable future behavior in prison if incarcerated for life.

We need not rely on affirmative evidence of jury confusion in order to reach this conclusion, however. *See Kelly v. South Carolina,* 534 U.S. 246, 122 S.Ct. 726, 733, 151 L.Ed.2d 670 (2002) ("Time after time appellate courts have found jury instructions to be insufficiently clear without any record that the jury manifested its confusion."). "A trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any indication of perplexity on their part." *Id.* To hold otherwise would condition our ability to redress serious constitutional violations on such subjective vagaries of fate as whether the jurors happened to ask a question instead of embarking boldly down the wrong path.

it appeared as one of the "certain factors" in "the listing." As we have discussed, Belmontes' principal mitigating evidence does not fall in this category.

The trial judge also instructed the jury that it could not consider a specific subject relating to Belmontes' ability to adjust to prison life. Less than thirty seconds after Juror Hern's inquiry, Juror Hailstone said: "Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The trial judge responded: "That is something you cannot consider in making your decision." He did not explain why the jury could not consider this issue, and immediately after issuing this response, he sent the jury off to resume its deliberations. The instruction not to consider possible future psychiatric treatment was misleading because of the judge's failure to explain to the jury why it could not consider the prohibited subject; to the extent that the jury believed that it could not consider mitigating evidence relating to how Belmontes might behave in a controlled prison environment, the instruction as given would likely have confirmed its misconception.

Juror Hailstone's question and the trial judge's response are troubling because of the likelihood that the jury understood them in the context of the larger discussion about how to consider, weigh, and balance aggravating and mitigating circumstances.[20/]

---

20. The government insists that the reason for his answer was obvious: There was no evidence presented on the topic of possible psychiatric treatment at Belmontes' trial; therefore, the jury could not consider it. The government argues that the jurors would have realized that this was why they could not consider Juror Hailstone's question, and so the trial judge's response could have had no effect on their deliberations. We reject this contention. The jurors at Belmontes' trial were not lawyers; they were not schooled in the rules of evidence, and they had no reason to know that the trial judge's response was based on an evidentiary concern (if, in fact, it was based on an evidentiary concern rather than on the trial judge's

In such case, the jury would have inferred from the trial judge's response that it could not consider Juror Hailstone's question, not because there had been no evidence presented on the subject at trial, but because it raised a consideration that did not relate to one of the "certain factors" set forth in "the listing," or, to put it differently, to one of the factors bearing on the defendant's culpability for the crime. The trial judge's response thus likely reinforced the jury's mistaken notion that Belmontes' mitigation evidence relating to his probable future good conduct if confined in a structured prison environment was irrelevant to the sentencing decision.

The next question is whether the trial judge's various instructions relating to limitations on the evidence that could be considered had an effect on the jury's deliberations. We may not reverse the jury's penalty determination unless the instructions actually created "a *reasonable probability* that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190 (emphasis added). The jury's decision must stand "if there is *only a possibility* of such an inhibition." *Id.* (emphasis added).

We hold that there is a reasonable probability that, as a result of the court's instructions, the jury in Belmontes' case did not consider his principal mitigating evidence. The trial judge began by giving a faulty instruction, one that on its face arguably does not allow consideration of mitigating evidence pertaining to the defendant's probable future good behavior in prison, as opposed to his culpability for the crime. He then rejected a significant part of the supplemental instruction that Belmontes proposed in an effort to solve the problem. The jurors were understandably confused, and they asked questions of the court in an effort to

---

misunderstanding of the law). It is far more likely that the jury would have viewed this question and its answer in the manner that we have described.

clarify the scope of their duty. In the course of that dialogue, the trial judge endorsed Juror Hern's view of the instructions, a view that strongly suggested that the jury could consider, weigh, and balance only "those certain factors" that appeared in "the listing." Following that endorsement, the trial judge advised the jury without further explanation that, in making its decision, it could not consider the possibility that Belmontes could receive psychiatric treatment in prison. In sum, every instruction that the jury received tended to convey the message that the jury could not consider Belmontes' mitigating evidence unless it related to his culpability for the crime. Under these circumstances, there is, at the least, a reasonable probability that the jury did not consider Belmontes' principal mitigation evidence--the evidence that provided the factual support for his argument in mitigation: that he would live a productive life if permanently incarcerated in a structured environment. Because "[t]he Eighth Amendment requires that the jury be able to consider and give effect to all relevant mitigating evidence offered by petitioner," *Boyde,* 494 U.S. at 377- 78, 110 S.Ct. 1190, the unadorned factor (k) instruction, as applied in Belmontes' case, was unconstitutional.

Having concluded that an error of constitutional magnitude infected the penalty phase of Belmontes' trial, we turn finally to the question whether that error was nonetheless harmless. *See Boyde,* 494 U.S. at 380, 110 S.Ct. 1190 (applying *Brecht* harmless error standard). Belmontes cannot obtain a new trial unless the instructional error had "a substantial and injurious effect" on the jury's verdict. *Brecht v. Abrahamson,* 507 U.S. at 637, 113 S.Ct. 1710. We hold that it did.

Our cases appear to be divided as to whether the petitioner, the state, or neither bears the responsibility for showing harmless error under the *Brecht* harmless error standard. *Compare Rodriguez v. Marshall,* 125 F.3d 739, 744 (9th Cir.1997) (placing burden on petitioner), *with Keating v. Hood,* 191 F.3d 1053, 1062 (9th Cir.1999) (as amended) (placing burden on

state), *and Thompson v. Borg*, 74 F.3d 1571, 1575 (9th Cir.1996) (rejecting burdens of proof in favor of an independent determination of whether a trial error had a substantial and injurious effect). In a recent case, we stated that "[t]he Supreme Court has made clear that whether a trial error had a substantial and injurious effect is not to be analyzed in terms of burdens of proof." *Mancuso v. Olivarez*, 282 F.3d 728, 737 n. 4 (9th Cir.), *as amended*, 292 F.3d 939 (2002), citing *O'Neal v. McAninch*, 513 U.S. 432, 436, 115 S.Ct. 992, 130 L.Ed.2d 947 (1995). In that case, we further stated that the reviewing court has "the responsibility to determine this legal question 'without benefit of such aids as presumptions or allocated burdens of proof that expedite factfinding at the trial.' " *Id.* (quoting *O'Neal*, 513 U.S. at 437, 115 S.Ct. 992). However, *O'Neal* also stated that "it is the State that bears the 'risk of doubt.' " *O'Neal*, 513 at 438, 115 S.Ct. 992; *Valerio v. Crawford*, 306 F.3d 742, 746 (9th Cir.2002)(en banc), *cert. denied*, 538 U.S. 994, 123 S.Ct. 1788, 155 L.Ed.2d 695 (2003). Also, as we said only recently, we look to the State to instill in us a "fair assurance" that there was no effect on the verdict. *See Morales v. Woodford*, 336 F.3d 1136, 1148 (9th Cir.2003) ("[T]he state must provide us with a 'fair assurance' that the error was harmless under Brecht."); *Valerio*, 306 F.3d at 762; *see also O'Neal*, 513 U.S. at 443, 115 S.Ct. 992 ("[T]he State normally bears responsibility for the error that infected the initial trial."). *Valerio* and *Morales* stand for the proposition that only if the State has persuaded us that there was no substantial or injurious effect on the verdict do we find the error harmless. Certainly, "if one is left in grave doubt [about the harmfulness of the error], the conviction cannot stand." *Mancuso*, 282 F.3d at 737 n. 4 (quoting *Kotteakos v. United States*, 328 U.S. 750, 765, 66 S.Ct. 1239, 90 L.Ed. 1557 (1946)).

Here we need not consider the issue of burdens of proof any further. Regardless of the applicable rule, we are convinced that the instructional error in this case, which prevented the jury from considering and giving effect to Belmontes' most important

mitigation evidence, had a substantial and injurious effect on the jury's verdict. At the penalty phase of this trial the aggravating evidence was not strong. It basically consisted of the fact that Belmontes was previously incarcerated in the youth facility for being an accessory after the fact to voluntary manslaughter, one domestic violence incident, and two occurrences relating to possession, or possible possession, of a gun. The prosecutor candidly told the jury that there was not a lot in the way of aggravating evidence. He asked the jury to return a death sentence because of the circumstances of the crime itself. Yet the crime, though shocking and deplorable, was in essence a robbery gone wrong. The murder was not pre-planned, nor did it involve kidnapping, rape, torture, multiple victims, or any of the other especially heinous elements that usually are present when a jury votes for the ultimate penalty. In short, the McConnell murder was of the kind that generally does not result in a death penalty.[21]

Under these circumstances, there is a reasonable probability that a properly instructed jury would have spared Belmontes' life had it believed that he would not pose a future danger if sentenced to life without parole, and that instead he would become a model prisoner who could contribute something of value to society. The state concedes that Belmontes presented "substantial" evidence in support of this mitigation theme. Several witnesses, including Belmontes himself, testified that although he had difficult in acting appropriately in the outside world, he thrived in the structured, institutional environment of prison. Belmontes described his experience on the CYA's fire

---

21. On this point, Belmontes submitted evidence that, of the thirty defendants who were tried for felony-murder in San Joaquin County between 1977 and 1986, only two, including Belmontes himself, received a death sentence. Many defendants whose crimes by any measure were substantially more aggravated than Belmontes' did not receive a death penalty.

crew, during which he rose from last man to number two, a position of leadership and responsibility, and about his gradually increasing involvement in Christianity during his prior incarceration. Reverend Barrett spoke about Belmontes' participation in the M-2 Christian sponsorship program, which he felt was genuine, and testified that in his opinion if granted a life sentence Belmontes would make positive contributions to prison life through his involvement with the prison ministries. One of Belmontes' most important witnesses was Reverend Miller, who testified that Belmontes had been good at counseling young inmates not to repeat the mistakes that he had made and that he "definitely would be used in the prison system for this kind of activity" if granted life without parole.

The importance of this mitigation theme was stressed during closing arguments. In his allocution, Belmontes took responsibility for his actions and stated that he did not want to use his difficult childhood as an excuse. He asked the jury to give him the opportunity to rehabilitate himself, set goals, and make a positive contribution to the welfare of others while in prison. His counsel repeated this theme in his emotional closing argument, in which he asked the jury to spare Belmontes' life on the ground that he would make positive contributions if allowed to live out his natural life in prison.

Given the weakness of the aggravating evidence and the substantial nature of the mitigating evidence, we conclude that had the jury been properly instructed, and had it understood that it could consider and give effect to the evidence regarding Belmontes' ability to function effectively in a prison setting, there is a reasonable probability that it would have returned a different verdict. Accordingly, Belmontes is entitled to relief on the sentencing phase.

CONCLUSION

Although we are disturbed by the prosecution's failure to disclose impeaching evidence and to correct false testimony on the part of its principal witness, as well as by defense counsel's failure to disclose the extent of his prior representation of Vasquez and to pursue a full investigation of Vasquez's background, and although we are at least as disturbed by the results of the study that showed the discriminatory racial effect of the County's capital charging policies, we cannot conclude, for the reasons we have explained, that any of these occurrences served to violate Belmontes' constitutional rights. Thus, we are compelled to deny relief with respect to the guilt phase, including the special circumstances finding. However, because the trial judge failed to instruct the jury that it was required to consider Belmontes' principal mitigation evidence, and because we conclude that this failure had a substantial and injurious effect upon the verdict, we reverse with respect to the sentencing phase. We remand to the district court with instructions to issue an appropriate writ vacating Belmontes' death sentence.

AFFIRMED in part, REVERSED in part, and REMANDED for issuance of the writ in accordance with this opinion.

O'SCANNLAIN, Circuit Judge, concurring in part and dissenting in part.

The court properly affirms Judge Levi's determination that there was no constitutional error in Belmontes's conviction for first-degree murder with special circumstances in state court. I am pleased to concur in its conclusions as to the guilt phase. Regrettably, as to the penalty phase, the majority strains mightily--and unpersuasively--to perceive constitutional error in the comprehensive and perfectly proper jury instructions given by the state trial judge. Because there simply is no such error, and the Supreme Court has expressly told us so on two separate occasions, I must respectfully dissent from the court's reversal of the district court's denial of the petition for the writ with respect

to the penalty phase.

Over a decade ago, the Supreme Court in *Boyde v. California*, 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), interpreted the same jury instruction at issue today, "factor (k)," and concluded that it was constitutionally sound. The Court held that there was no "reasonable likelihood that the jury ... applied [factor (k)] in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Id.* at 380, 110 S.Ct. 1190. Factor (k)'s constitutionality was recently reaffirmed in *Brown v. Payton*, 544 U.S. ----, 125 S.Ct. 1432, 1442, 161 L.Ed.2d 334 (2005), where the Court again refused to invalidate a death sentence imposed pursuant to instructions that included factor (k). The Court reached that result even though the prosecutor had explicitly argued to the sentencing jury that factor (k) prohibited them from considering the defendant's mitigating evidence. *Id.* at 1440.

The majority nonetheless manages to distinguish *Boyde* and *Payton*, and reaches the extraordinary conclusion that there was a reasonable likelihood that the jury refused to consider mitigating evidence that *both* the prosecution and the defense acknowledged was properly before it. Because the jurors were not constitutionally barred from making a death penalty determination in this case, I would affirm.

I

At the close of the penalty phase, the state trial court judge began instructing the jury on aggravating and mitigating circumstances as follows: "In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed." The court then read an enumerated list of seven factors, exhaustive with respect to aggravating circumstances, but only examples with respect to

mitigating circumstances. The last of these factors, factor (k), instructs the jury to consider, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." The majority, by misconstruing both Supreme Court precedent and the evidence in this case, concludes that the factor (k) instruction failed to provide an outlet for the jury to consider some of Belmontes's penalty phase evidence.

A

The majority's holding is based on the false premise that factor (k) limits the jury's consideration only to circumstances that might excuse the crime. *See supra,* at 1134. But the Supreme Court has already explicitly rejected this proposition. In *Boyde,* the Court held that factor (k) did not "limit the jury's consideration to 'any other circumstances *of the crime* which extenuates the gravity of the crime.' [It directed the jury] to consider *any other circumstance* that might excuse the crime, which certainly includes a defendant's background and character." 494 U.S. at 382, 110 S.Ct. 1190 (emphases in original); *see also id.* at 381, 110 S.Ct. 1190 (holding that there was "no[ ] ... reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character"). *Boyde* makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k).

Belmontes's penalty phase presentation was entirely composed of such evidence. The witnesses who testified on his behalf spoke to his religious convictions and his behavior while a ward of the California Youth Authority ("CYA")--all of which goes to his background and character *before* he murdered Steacy. While the majority attempts to paint such evidence as showing that he would be a model inmate if sentenced to life in prison, the

testimony as actually presented deals exclusively with his character prior to the crime. In fact, not one witness who testified during the penalty phase testified to Belmontes's behavior after the murder.

Belmontes's religious conversion and ability to conform to prison are exactly the types of evidence that the Supreme Court held fit within the plain language of factor (k). *See Boyde,* 494 U.S. at 382, 110 S.Ct. 1190 (holding that Boyde's strength of character in the face of adversity was considered evidence that "excused" the gravity of the crime under factor (k)). Accordingly, under *Boyde,* the jury was able to consider and to give effect to *all* of Belmontes's mitigating evidence. Nothing more was constitutionally required. *Johnson v. Texas,* 509 U.S. 350, 372, 113 S.Ct. 2658, 125 L.Ed.2d 290 (1993) (holding that "a jury [need not] be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant").

Even so, the Supreme Court has held that inquiry into *future* dangerousness of a defendant "is not independent of an assessment of personal culpability." *Id.* at 369, 113 S.Ct. 2658. In *Johnson,* the Court held that an instruction that asked jurors to consider the future dangerousness of a defendant provided ample opportunity for the jury to consider the defendant's youth as mitigating evidence. *Id.* at 369-70, 113 S.Ct. 2658. Even though the statutory factor did not explicitly provide that the jury could consider the defendant's youth as a mitigating factor for culpability of the crime, the Court concluded that there was no reasonable likelihood that the jury would have thought it was foreclosed from considering it. *Id.* at 370, 113 S.Ct. 2658.

Likewise, because factor (k) allows the jury to consider Belmontes's character and background, there is no reason to think that the jury would have thought it was foreclosed from using such information to consider his future potential if

sentenced to life in prison. As the Supreme Court has noted, "Consideration of a defendant's past conduct as indicative of his probable future behavior is an *inevitable* and not undesirable element of criminal sentencing." *Skipper v. South Carolina,* 476 U.S. 1, 5, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986) (emphasis added); *see also Boyde,* 494 U.S. at 382, 110 S.Ct. 1190 ("Petitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death."); *cf. Johnson,* 509 U.S. at 370, 113 S.Ct. 2658.

Thus, while the majority scours the cold record decades after the trial to find an ambiguity in the sentencing instruction, it is highly doubtful that the jury itself would have so found. "Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might." *Boyde,* 494 U.S. at 380-81, 110 S.Ct. 1190. I see no reason why the jury would have resisted the inevitable consideration of Belmontes's future potential in light of the character evidence presented.

B

The majority also ignores the Supreme Court's advice that "[d]ifferences ... in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in light of all that has taken place at the trial likely to prevail over technical hairsplitting." *Boyde,* 494 U.S. at 381, 110 S.Ct. 1190. That factor (k) permits the consideration of Belmontes's character evidence is amplified when the penalty phase is viewed as a whole, particularly in light of the arguments made by counsel. *See Payton,* 125 S.Ct. at 1440 ("*Boyde* ... mandates that the whole context of the trial be considered.").

In *Payton*, the prosecutor explicitly argued during the penalty phase that factor (k) did not permit the jury to consider evidence of the defendant's post-crime religious conversion. *Id.* Notwithstanding the trial judge's failure to correct this misstatement of law, the Supreme Court concluded that habeas relief was not warranted because it was improbable that the sentencing jury would have disregarded the two days of mitigating evidence presented by the defense. *Id.* In contrast, during the penalty phase of Belmontes's trial, *both* the prosecutor and the defense attorney urged the jury to consider the mitigating evidence, and the trial court likewise instructed the jury to consider all the evidence unless directed otherwise. *See Boyde*, 494 U.S. at 383, 110 S.Ct. 1190 (relying in part on the fact that Boyde's jury was instructed that it "*shall consider all of the evidence* which has been received during any part of the case" (emphasis in original)). The majority nevertheless concludes that the jury likely misunderstood its sentencing task after repeatedly receiving the same unambiguous directions from the prosecutor, the defense attorney, and the court.

The jury heard, without objection, evidence regarding Belmontes's behavior in prison before the murder: how he had found God and how he could serve as an example to other inmates. In its closing argument, the prosecution stated, "I suspect you will be told ... that the defendant's religious experience is within that catchall [factor (k)] that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime. I'm not really sure it fits in there. I'm not sure it really fits in any of them." Even so, the prosecutor noted, "But I think it [Belmontes's religious experience] appears to be a proper subject of consideration."

Later the prosecutor expounded on why the jury *should* consider Belmontes's evidence:

I suppose you can say it would be appropriate [to consider

such evidence] because--in this fashion: The defendant may be of value to the community later. You recall the people talking about how he would have the opportunity to work with other prisoners in prison. And I think that value to the community is something that you have to weigh in. There's something to that.[1]

Payton, 125 S.Ct. at 1446 (Souter, J., dissenting).

Belmontes's pleas were similar. Belmontes asked for life in prison because in prison "there is an opportunity to achieve goals and try to better yourself." His counsel continued the argument, asking the jury to spare Belmontes's life because he would make a positive contribution if his life were spared: "[W]hat I am suggesting to you and what I hope the evidence suggests to you is Fernando Belmontes cannot make it on the outside. I think it is pretty clear from the development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own." He added:

---

1. The prosecutor's admonition to the jury that it must consider Belmontes's mitigating evidence contrasts sharply with the statements of the *Payton* prosecutor, who forcefully argued that factor (k) required the jury to disregard all of the defendant's mitigating evidence:

"[Factor] K" says any other circumstance which extenuates or lessens the gravity of the crime. What does that mean? That to me means some fact--okay?--some factors at the time of the offense that somehow operates to reduce the gravity for what the defendant did. It doesn't refer to anything after the fact or later. That's particularly important here because the only defense evidence you have heard has been about this new born Christianity.

....

What I am getting at, you have not heard during the past few days any legal evidence mitigation. What you've heard is just some jailhouse evidence to win your sympathy, and that's all. You have not heard any evidence of mitigation in this trial.

> The people who came in here told you about him. They told you not only what they know of him, but they gave you, as best they could, under the very difficult circumstances of somebody looking at the rest of their life in prison, a game plan, something he can do with his life, something he's been able to do. We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, to contribute something in whatever way he can.

At no time did the prosecutor object to the defense's characterization, nor did the trial judge indicate that the parties' statements of law were not correct or that the jury could not consider any of the evidence. Nevertheless, the majority concludes that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes's lawyer were not smart enough to realize they were all mistaken. *See Payton,* 125 S.Ct. at 1440 ("for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all"). In its world, the majority envisions a jury playing a game of "gotcha" with the lawyers, whereby the jury ignores everyone and applies its own instructions. Such a conclusion is pure fantasy and cannot justify overturning the jury's choice here. *See Buchanan v. Angelone,* 522 U.S. 269, 278-79, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998) ("The parties in effect *agreed* that there was substantial mitigating evidence and that the jury had to weigh that evidence against petitioner's conduct in making a discretionary decision on the appropriate penalty. In this context, there is not a reasonable likelihood that the jurors in petitioner's case understood the challenged instructions to preclude consideration of relevant mitigating evidence offered by petitioner." (emphasis in original; internal quotation marks omitted)).

II

Even assuming, arguendo, that there was a reasonable likelihood that the jury could have interpreted factor (k) to prohibit consideration of Belmontes's character witnesses, the instructions were still constitutionally sufficient. To arrive at its result, the majority downplays the trial court's *initial* instruction, in which the jury was told, "In determining which penalty is to be imposed on the defendant you *shall consider all of the evidence which has been received during any part of the trial of this case,* except as you may be hereafter instructed." (emphasis added). Such a jury instruction alone is constitutionally sufficient to convey to the jury its duty to consider all mitigating evidence. *See Buchanan,* 522 U.S. at 277, 118 S.Ct. 757 (holding that there was no likelihood of confusion when the jury had to indicate on the statutory verdict form that it had "considered the evidence in mitigation of the offense" and the trial court provided the following mitigation instruction: "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment"); *Johnson,* 509 U.S. at 368, 113 S.Ct. 2658 (holding that a jury instruction that stated that the jury could consider all the mitigating evidence presented during both the guilt and penalty stage was sufficient to inform the jury that it could consider evidence of defendant's youth); *Blystone v. Pennsylvania,* 494 U.S. 299, 307-08, 110 S.Ct. 1078, 108 L.Ed.2d 255 (1990) ("In petitioner's case the jury was specifically instructed to consider, as mitigating evidence, any 'matter concerning the character or record of the defendant, or the circumstances of his offense.' This was sufficient to satisfy the dictates of the Eighth Amendment." (citation omitted)); *cf. Tuilaepa v. California,* 512 U.S. 967, 979, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994) ("A capital sentencer need not be instructed how to weigh any particular fact in the capital sentencing decision.").

The trial court's duty is simply to convey to the jury that all mitigating evidence must be considered and may be given effect

when it deliberates on a defendant's capital sentence. *Buchanan*, 522 U.S. at 276, 118 S.Ct. 757. The absence of *any specific instruction* to the jury to consider the defendant's ability to adjust to an institutional setting is utterly irrelevant. *Id.* at 277, 118 S.Ct. 757 ("By directing the jury to base its decision on 'all the evidence,' the instruction afforded jurors an opportunity to consider mitigating evidence.").

Even if the jury were confused by the subsequent enumeration of individual factors--perhaps thinking that its consideration of mitigating evidence was limited to such factors--the confusion would have been short lived. After reading the enumerated factors, the court instructed, "[T]he mitigating circumstances which I have read for your consideration are *given to you merely as examples of some of the factors* that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." The majority, however, fixates, not on the clear language of such directive, but on the two sentences that directly follow: "You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case." According to the majority, these sentences somehow obfuscate the clarity of the court's instructions.

We must look at these instructions in their entirety, however. *See Boyde*, 494 U.S. at 378, 110 S.Ct. 1190 ("we accept at the outset the well-established proposition that a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge" (internal quotation marks omitted)). The judge instructed:

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not

allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

When these instructions are read in context, there is little doubt that the court conveyed the message that the enumerated factors were not the exclusive mitigating circumstances that the jury could consider. The court first instructed the jury how to apply the aggravating circumstances, specifically that it could not consider any non-enumerated factors. The court then contrasted consideration of aggravating factors with mitigating factors, which it noted were merely "examples of some of the factors" that the jury could consider. The fact that the court further instructed that the jury should consider each of the mitigating factors (recall that "factors" refers to *all* mitigating circumstances and not, as the majority implies, to the enumerated circumstances read by the judge), as any one alone might support life in prison, was unlikely to confuse the jury, when viewed in totality.

The trial court's additional instruction reinforced the constitutional requirement of conveying to the jury that it is "not ... precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Buchanan*, 522 U.S. at 276, 118 S.Ct. 757. Instead of confusing the jury, the trial court's instructions made it clear that all evidence that was presented must be considered. Moreover, the instruction 8362 that the majority concludes was "critical," *supra*, at 1135,

substantively adds nothing. Rather than speculating that the jury was too dim to understand what it was told by the court, we must presume that the jury understood the instructions taken as a whole. *Weeks v. Angelone*, 528 U.S. 225, 234, 120 S.Ct. 727, 145 L.Ed.2d 727 (2000).

III

According to the majority, however, it is the series of questions between individual jurors and the judge that proves the jury's confusion. After the jury deliberated for several hours, it sent the judge a note asking, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" The judge refused to tell the jury what would happen if they could not agree, but told them that it would discharge them if they could not reach an agreement. He then asked, "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?"

At this time, individual jurors asked the judge some questions.

JUROR HERN: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?
THE COURT: That was the listing, yes, ma'am.
JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?
THE COURT: That is right. It is a balancing process.
....

JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?

THE COURT: That is something you cannot consider in making your decision.

In the majority's view, Juror Hern's use of the term "listing," and the judge's failure to note that the "listing" was not exclusive as to mitigating circumstances, shows that individual jurors were confused by the instruction. I respectfully disagree. The jury did not submit a formal question to the judge to indicate that it was confused as to its duties or the instructions, and no informal follow-up questions were asked by any jurors. And while the answers the judge gave the juror might have been cryptic, they were not incorrect. *Cf. Bollenbach v. United States,* 326 U.S. 607, 613, 66 S.Ct. 402, 90 L.Ed. 350 (1946).

Most importantly, just before the judge answered these informal questions, he asked the jury "to go over the instructions again." Under existing Supreme Court authority, any confusion with regard to its responsibilities would have been cleared up with another such review. *See Weeks,* 528 U.S. at 233-34, 120 S.Ct. 727 (holding that no likelihood of confusion existed when the trial judge referred back to his original instruction when the jury asked a question regarding the instructions themselves). And if, after reviewing the instructions once again, jurors were still confused about the evidence they could consider, they likely would have asked for a formal clarification. *See id.* at 234, 120 S.Ct. 727 (noting that the jury did not submit a follow-up question after the judge referred it back to the original instructions). While it is *possible* that after reviewing the instructions again, confusion might have arisen, it was certainly not *reasonably likely. See Boyde,* 494 U.S. at 380, 110 S.Ct. 1190.

Incredulously, the majority also takes issue with Juror Hailstone's question regarding whether Belmontes could receive psychiatric treatment while in prison. The court properly instructed the jury that it could not consider such potentially mitigating evidence. And for good reason: *no such evidence was ever introduced at any stage of the trial.* Indeed, the jury

was prohibited from such considerations. *See Hughes v. Borg*, 898 F.2d 695, 700 (9th Cir.1990) ("State defendants have a federal constitutional right to an impartial jury and jurors have a correlative duty to consider only the evidence that is presented in open court."); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 468, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (Kennedy, J., concurring) ("Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, a jury is bound to consider only the evidence presented to it in arriving at a judgment." (citations omitted)).

There was absolutely nothing wrong with the trial judge's instruction that the jury could not consider evidence that was not presented; indeed, it would have been unconstitutional for him to have said otherwise. Yet, the majority ignores such niceties. If the jury were truly confused by the judge's answer, surely it would have asked a follow-up question of some sort. Nonetheless, without any basis in the record, the majority concludes that the judge's perfectly proper statement was likely to confuse.

IV

The majority concludes that the jurors listened to all the evidence regarding Belmontes's character, listened to the prosecution and the defense tell it to consider such evidence, and listened to the trial court tell it that it must consider all the evidence presented; yet the majority holds that the jury was confused about whether it could consider the evidence presented. Such conclusion, with all due respect, is simply beyond belief; such holding turns the entire proceeding "into a virtual charade." *Boyde*, 494 U.S. at 383, 110 S.Ct. 1190 (internal quotation marks omitted).

The jury, in reality, returned a death sentence for Belmontes,

not because of a confusing jury instruction, but because he murdered nineteen-year-old Steacy McConnell in cold blood, striking her 15-20 times in the head with an iron dumbbell he had brought with him to her house in case of such an encounter; I sincerely doubt the family and friends of Steacy would share the majority's callous view that her murder was not "especially heinous."

Not surprisingly, the prosecution was able to portray Belmontes as a violent young man by focusing on his past behavior: his armed theft of a loaded handgun, his tendency to carry such a weapon, his fight with another ward while in the CYA after pleading guilty to being an accessory after the fact to voluntary manslaughter, and his battery of his pregnant girlfriend, which caused her to drop their two-year-old daughter. It is such violent, antisocial behavior, not an ambiguous jury instruction, that placed him in the situation he now finds himself.

Perhaps the jury simply did not believe that a convicted murderer might be a particularly good role model to other inmates, despite Reverend Miller's testimony that Belmontes would be good at counseling other inmates not to repeat his "mistakes." After all, Steacy's murder was hardly a "mistake." Perhaps Belmontes's jailhouse conversion to Christianity, which mysteriously lapsed as soon as he returned to society, and his ascent to the top of CYA's fire crew, could rightly have been seen as manipulative ploys to gain early release for his previous crimes. *Cf. Payton*, 125 S.Ct. at 1442 ("Testimony about a religious conversion spanning one year and nine months may well have been considered altogether insignificant in light of the brutality of the crimes, the prior offenses, and a proclivity for committing violent acts against women.").

By concluding that the trial court's jury instructions were unconstitutional, the majority ignores the "strong policy against retrials years after the first trial where the claimed error amounts

to no more than speculation." *Boyde*, 494 U.S. at 380, 110 S.Ct. 1190. There is nothing in the record which would lead me to believe that there was a reasonable probability that the jury was confused about its sentencing duties; therefore I would affirm the denial of the petition for the writ as to the penalty phase. I must respectfully dissent from the majority's refusal to do so.[2]

---

2. Belmontes also contends that he was deprived of constitutionally effective counsel during the penalty stage of his trial. His claim is without merit. *See Strickland v. Washington*, 466 U.S. 668, 694, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Gerlaugh v. Stewart*, 129 F.3d 1027, 1035-36 (9th Cir.1997).

No. 05-493

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ORNASKI, WARDEN, PETITIONER

v.

FERNANDO BELMONTES, RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ERIC S. MULTHAUP
State Bar 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
415-821-6000
Attorney for Respondent
FERNANDO BELMONTES
In Forma Pauperis

TOPICAL INDEX

Page

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI 1

ARGUMENT

I. THE NINTH CIRCUIT DID NOT MISCONSTRUE OR MISAPPLY BOYDE V. CALIFORNIA, 494 U.S. 370 (1990), OR BROWN V. PAYTON, 544 U.S. 133, 125 S.Ct. 1432. 2

II. THE NINTH CIRCUIT RELIED ON THE SETTLED LAW OF THIS COURT IN COMPLETE COMPLIANCE WITH TEAGUE V. LANE, 489 U.S. 288 (1989). 7

CONCLUSION 8

CERTIFICATE OF WORD COUNT 10

TABLE OF AUTHORITIES

	Page
CASES CITED	
Belmontes v. Brown 414 F.3d 1094, 1102 (2005)	3, 4
Boyde v. California 494 U.S. 370 (1990)	2, 3
Brown v. Payton 544 U.S. 133 (2005)	2
Eddings v. Oklahoma 455 U.S. 104 (1984)	7
Lockett v. Ohio 438 U.S. 506 (1978)	7
Skipper v. South Carolina 476 U.S. 1 (1986)	7
Teague v. Lane 489 U.S. 288 (1989)	3, 7
STATUTES CITED	
28 U.S.C. section 2254	8

Eric S. Multhaup
State Bar 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
415-821-6000
Attorney for Respondent Fernando Belmontes

No. 05-493

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ORNASKI, WARDEN, PETITIONER

v.

FERNANDO BELMONTES, RESPONDENT

On Petition for Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit

---

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Fernando Belmontes, through his attorney Eric S. Multhaup, hereby opposes the Petition for Writ of Certiorari filed on behalf of Steven Ornaski, Warden, California State Prison at San Quentin.

Respondent has no objection to those sections of the petition entitled "Opinion or Judgment Below," "Statement of Jurisdiction," or "Relevant Constitutional Provisions and Statutes," except that Respondent did invoke and did obtain relief in reliance on the Fourteenth Amendment as well as the Eighth Amendment, see Petitioner's Appendix, p. 291a. Respondent does object to the rhetorical characterization of the offense at pp. 2-3. Respondent does not object to the portion of the petition entitled "State Court Proceedings" as far as accuracy, and will supplement the references contained in that section as needed in the opposition below.

Respondent disagrees that the decision of the Ninth Circuit Court of Appeals presents either of the two "Questions Presented," as set forth in the Petition for Writ of Certiorari. To the contrary, the Ninth Circuit decision applies the settled law of this Court to the particular facts of this case to reach a constitutionally irreproachable result.

ARGUMENT

I. THE NINTH CIRCUIT DID NOT MISCONSTRUE OR MISAPPLY BOYDE V. CALIFORNIA, 494 U.S. 370 (1990), OR BROWN V. PAYTON, 544 U.S. 133, 125 S.Ct. 1432.

Petitioner argues that "the Ninth Circuit's opinion is irreconcilable with this Court's holding in Boyde," Petition, p. 10, but this assertion is

unsupportable. This Court remanded the Ninth Circuit's prior opinion for re-consideration in light of Brown v. Payton, 544 U.S. 133, 125 S.Ct. 1432 (2005), and the Ninth Circuit did just that, paying close attention to the Payton decision– "Having carefully reviewed Payton, and our previous independent determination of the constitutional question at issue, we find no reason to change our judgment on the matter," Belmontes v. Brown, 414 F.3d 1094, 1102 (2005); see Appendix, p. 233a.

The Attorney General's argument is virtually identical to the argument he previously made following the 2003 decision of the Ninth Circuit, i.e., that the decision conflicts with Boyde, supra, and is barred by Teague v. Lane, 489 U.S. 288 (1989). The crux of the Boyde decision was that "[a]pplying this standard to factor (k) of CALJIC 8.84.1 standing alone, we think there is not a reasonable likelihood that Boyde's jurors interpreted the trial court's instructions to prevent consideration of mitigating evidence of background and character." 494 U.S at 381 (emphasis supplied).

The Ninth Circuit opinion at issue here did not find that factor (k) "standing alone" created a reasonable likelihood that the jurors believed they were precluded from considering respondent's mitigating evidence. To the contrary, the Ninth Circuit concluded that a constellation of misleading

instructions, primarily occurring during the crucible of jury deliberations, in combination misled the jury as to the correct consideration of mitigating evidence:

> We hold that there is a reasonable probability that, as a result of the court's instructions, the jury in Belmontes' case did not consider his principal mitigating evidence. The trial judge began by giving a faulty instruction, one that on its face arguably does not allow consideration of mitigating evidence pertaining to the defendant's probable future good behavior in prison, as opposed to his culpability for the crime. He then rejected a significant part of the supplemental instruction that Belmontes proposed in an effort to solve the problem. The jurors were understandably confused, and they asked questions of the court in an effort to clarify the scope of their duty. In the course of that dialogue, the trial judge endorsed Juror Hern's view of the instructions, a view that strongly suggested that the jury could consider, weigh, and balance only "those certain factors" that appeared in "the listing." Following that endorsement, the trial judge advised the jury without further explanation that, in making its decision, it could not consider the possibility that Belmontes could receive psychiatric treatment in prison. In sum, every instruction that the jury received tended to convey the message that the jury could not consider Belmontes' mitigating evidence unless it related to his culpability for the crime. Under these circumstances, there is, at the least, a reasonable probability that the jury did not consider Belmontes' principal mitigation evidence--the evidence that provided the factual support for his argument in mitigation: that he would live a productive life if permanently incarcerated in a structured environment. Belmontes v. Brown, 414 F.3d 1094, 1138 (9th Cir. 2005) (emphasis supplied).

The Attorney General characterizes the decision as one that rested solely on a claim of instructional error based on the factor (k) instruction, and never addresses the erroneous instructions given in response to specific questions

posed by jurors Hern and Hailstone during deliberations. The Ninth Circuit addressed those questions and the erroneous responsive instructions in detail, see Appendix, pp. 295a to 299a. In contrast, the Attorney General glosses over this entire discussion with the dismissive comment that "[t]he Belmontes majority also finds the trial judge somehow 'compounded the problem' with his informal answers to juror questions during deliberations," but that "[f]or the reasons discussed, however, there simply was no 'problem' to compound," Petition, p. 19.

The Attorney General further fails to acknowledge that the sole claim of instructional error in Brown v. Payton, 544 U.S. 133 (2005) was limited to the asserted deficiencies in factor (k) of CALJIC 8.81.7, and this Court specifically noted that after receiving the factor (k) instruction, the jury "was not thereafter instructed to disregard anything." 125 S.Ct. at 1441. In this case, the trial court's supplemental instructions to the jury did in effect "instruct [them] to disregarding anything" that was not a statutory mitigating factor, and the Ninth Circuit relied on those misinstructions as a significant component of the constitutional error:

> Juror Hern's questions reveal that she did not understand that her duty as a juror was to consider all of Belmontes' mitigating evidence. The most reasonable way to interpret her first question is

> as an effort to clarify that the jury should look to the statutory factors (a) through (g) [or unadorned (k)], as read to the jury by the trial judge, to determine what counted as aggravating and mitigating circumstances. It appears that by asking, "that was the listing?," Juror Hern wanted confirmation that there was a finite list of factors for the jury to consider and that the list consisted of the statutory factors read to the jury by the judge. This interpretation is reinforced by Juror Hern's next question: "Of those certain factors, we were to decide one or the other [e.g., whether the evidence is aggravating or mitigating] and then balance the sheet?" The structure of this question separates the "certain factors" that appear in "the listing" from other factors that may not be reflected there. It makes it clear that at least one juror believed that the jury should consider, weigh, and balance only "those certain factors" that appeared in "the listing." Of course, such a belief would have been incorrect; the jury was required to consider and evaluate Belmontes' mitigating evidence relating to his potential adjustment to life in prison regardless of the fact that it was not listed in the statute. 414 F.3d at 1136.

The trial court's answers to Juror Hern's questions would have adversely affected all of the jurors, and would the trial court's subsequent response to Juror Hailstone's questions. The Ninth Circuit decision was corrected decided and entirely consistent with both Boyde and Payton because the trial court made multiple, reinforcing and compounding instructional errors, which were not present in either Boyde or Payton.

In sum, the Attorney General would have this Court grant certiorari based on an inaccurate characterization of the ratio decidendi of the Ninth Circuit. Respondent urges the Court to deny certiorari because the Ninth

Circuit's ruling faithfully applied this Court's precedents from Lockett v. Ohio, 438 U.S. 506 (1978), through Eddings v. Oklahoma , 455 U.S. 104 (1984), Skipper v. South Carolina, 476 U.S. 1 (1986), and up to and including Payton, supra. See Belmontes, supra, at 1131 – 1133.

II. THE NINTH CIRCUIT RELIED ON THE SETTLED LAW OF THIS COURT IN COMPLETE COMPLIANCE WITH TEAGUE V. LANE, 489 U.S. 288 (1989).

The Attorney General's second argument is that the Ninth Circuit opinion "rests on a new rule in violation of Teague," Petition at p. 21. To the contrary, the result reached by the Ninth Circuit depends not on a new rule fashioned from Boyde v. California supra, but from the longstanding prior authority of Eddings v. Oklahoma, supra, Lockett v. Ohio, supra, and Skipper supra. The basic constitutional principle relied on by the Ninth Circuit was that the "Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate," 414 F.3d at 1131, a well-settled principle that long pre-dated the decision of the California Supreme Court in 1989.

Perhaps the clearest indicator of the flaw in the Attorney General's argument is that this Court remanded to the Ninth Circuit for reconsideration in light of Payton, not reconsideration in light of Teague. Particularly since the

Attorney General made this unavailing argument in his 2004 petition for certiorari, and since the Attorney General offers no additional argument responsive to the ineluctable fact that the Ninth Circuit opinion expressly cited and relied on pre-existing precedent noted above, there is no basis for granting certiorari on this question.

CONCLUSION

The crux of this Court's ruling in Payton was that under the deferential standard of review imposed by 28 U.S.C. section 2254(d)(1) of the A.E.D.P.A., the decision of the California Supreme Court, wrong as it may have been, was not "objectively unreasonable," and therefore precluded federal habeas corpus relief – "Even on the assumption that its conclusion was incorrect, it was not unreasonable, and is therefore just the type of decision that AEDPA shields on habeas review." Payton, 125 S.Ct. at 1439. In contrast, this is a pre-AEDPA case, and the standard of review is substantially different, as the Ninth Circuit panel pointed out – "The issue here is not the AEDPA issue that the Court confronted in Payton, but whether the state court engaged in an 'incorrect' application of federal law," 414 F.3d at 1101. The Ninth Circuit applied that standard of review to a case specific set of facts, and reached a constitutionally irreproachable result. There is no basis to grant certiorari in this case.

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court deny the Petition for Writ of Certiorari.

Dated: January 26, 2006

Respectfully submitted,

ERIC MULTHAUP, Attorney for
Respondent FERNANDO BELMONTES

CERTIFICATE OF WORD COUNT

I certify that this Opposition to Petition for Writ of Certiorari consists of 2197 words.

Dated: January 26, 2006

ERIC S. MULTHAUP

DECLARATION OF SERVICE

RE: Steven Ornaski, Warden vs. Fernando Belmontes

I, Eric S. Multhaup, am over the age of 18 years, am not a party to the within entitled cause, and maintain my business address at 20 Sunnyside Avenue, Suite A, Mill Valley, California 94941. I served the attached:

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

on the following individuals/entities by placing a true and correct copy of the document in a sealed envelope with postage thereon fully prepared, in the United States mail at Mill Valley, California, addressed as follows:

Attorney General
Attn: Mark Johnson, Esq.
P. O. Box 944255
Sacramento, CA 94244-2550

I declare under penalty of perjury that service was effected on January 26, 2006 at Mill Valley, California and that this declaration was executed on January 26, 2006 at Mill Valley, California.

ERIC S. MULTHAUP

(2)

No. 05-493

FILED
FEB 8 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

STEVEN ORNASKI, *Petitioner*,

v.

FERNANDO BELMONTES, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
MANUEL M. MEDEIROS
State Solicitor General
DONALD E. DE NICOLA
Deputy State Solicitor General
MARY JO GRAVES
Senior Assistant Attorney General
WARD C. CAMPBELL
Supervising Deputy Attorney General
MARK A. JOHNSON
Att. Supervising Deputy Attorney General
State Bar No. 179141
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960
Counsel for Petitioner

TABLE OF CONTENTS

	Page
THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDINGS IN *BOYDE v. CALIFORNIA*, 494 U.S. 370 (1990), AND *BROWN v. PAYTON*, 544 U.S. __, 125 S.CT. 1432 (2005)	1
THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE v. LANE*, 489 U.S. 288 (1989)	4
CONCLUSION	6

TABLE OF AUTHORITIES

	Page
Cases	
Belmontes v. California 488 U.S. 1034 (1989)	4
Boyde v. California 494 U.S. 370 (1990)	1, 2
Brown v. Payton 544 U.S. ___, 125 S.Ct. 1432 (2005)	1-4
Butler v. McKellar 494 U.S. 407 (1990)	4, 5
Gilmore v. Taylor 508 U.S. 333 (1993)	5
Johnson v. Texas 509 U.S. 350 (1993)	2
Sawyer v. Smith 497 U.S. 227 (1990)	5
Skipper v. South Carolina 476 U.S. 1 (1986)	2
Stringer v. Black 503 U.S. 222 (1992)	4, 5
Teague v. Lane 489 U.S. 288 (1989)	4
Weeks v. Angelone 528 U.S. 225 (2000)	2

IN THE SUPREME COURT OF THE UNITED STATES

No. 05-493

STEVEN ORNASKI, *Petitioner*,

v.

FERNANDO BELMONTES, *Respondent*.

THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDINGS IN *BOYDE v. CALIFORNIA*, 494 U.S. 370 (1990), AND *BROWN v. PAYTON*, 544 U.S. __, 125 S.CT. 1432 (2005)

Belmontes' opposition to the certiorari petition conspicuously sidesteps any discussion of the substance of this Court's *Boyde* and *Payton* decisions. Belmontes instead attempts to recast the circuit court's holding in terms of a fact-specific inquiry concerning "multiple, reinforcing and compounding instructional errors, which were not present in either *Boyde* or *Payton*." (Opp. 5.)

In this regard, Belmontes seeks to minimize the circuit court's overriding emphasis on the alleged constitutional deficiencies of California's "unadorned factor (k)" instruction. By focusing on the circuit court's subsidiary discussion about (1) the "special instruction" given in this case and (2) the trial court's allegedly improper responses to Juror Hern's questions during deliberations[1/], Belmontes attempts to distinguish *Boyde* and *Payton* because neither of those cases included these particular facts. (Opp 3-5.)

---

1. As discussed in the opening petition for writ of certiorari, this complaint about the judge's responses to Juror Hern's questions was the sole basis of any claim of instructional error raised in the Ninth Circuit and, for that matter, was the only claim of penalty-phase instructional error raised in Belmontes' many years of federal habeas litigation.

Nothing in the Ninth Circuit's opinion suggests that its decision depended upon, or would have been any different but for, these ancillary matters. Under any rational reading, the Ninth Circuit's finding of instructional error turns on the "unadorned factor (k)" instruction's purported insufficiency in informing jurors they may consider "forward-looking" evidence of a defendant's future prospects in prison. App. 286a-295a. The discussion about the mid-deliberation colloquy with Juror Hern (which is Belmontes' primary point of distinction) merely supplements the circuit court's finding regarding the "unadorned factor (k)." In this regard, the Ninth Circuit concluded that the trial court's answers to Juror Hern served only to "[c]ompound[] the problems with the original and supplemental instructions...." App. 295a-299a.

As discussed in the petition for writ of certiorari, however, there simply was no "problem" to compound. As was true in *Boyde*, the jurors in this case would have reasonably understood the "unadorned factor (k)" instruction as permitting consideration of all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383. As was true in *Payton*, there is no reasonable chance that the jurors misinterpreted the "factor (k)" instruction to preclude consideration of "forward-looking" considerations based on probable post-crime behavior. *Payton*, at 1439-40. The jurors here would have realized, based on the "factor (k)" instruction alone, that they could consider evidence of Belmontes' character for good future behavior in prison as being an "inevitable" element of their sentencing determination. *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986).

Indeed, the "unadorned factor (k)" instruction provided more than constitutionally-adequate guidance about the "forward-looking perspective of future dangerousness," which–consistent with *Boyde* and *Skipper*–"is not independent of an assessment of personal culpability." *Johnson v. Texas*, 509 U.S. 350, 369-370 (1993).

In any event, Belmontes' protestations about the mid-deliberation colloquy with Juror Hern are unavailing. During this informal conference with the jurors, the court directed them to "go over the instructions again with one another." The trial court's directive to review the previous instructions would have cured any possible confusion. *See Weeks v. Angelone*, 528 U.S.

225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves).

The previous instructions given in this case included the "unadorned factor (k)," which, as in *Boyde*, unambiguously informed the jurors that (1) they were to "consider all of the evidence which has been received during any part of the trial" and (2) they were to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." Additionally, the previous instructions included the following "special instruction":

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

In his efforts to distinguish *Boyde* and *Payton*, Belmontes insists that this "special instruction" somehow compounded the "factor (k)" instruction's alleged deficiencies. It is true that no such "special instruction" was given in either *Boyde* or *Payton*. However, this "special instruction" certainly did not "compound" any alleged problem. To the contrary, under any rational reading this "special instruction" *further confirmed* that the jurors could consider *any* mitigating evidence in any way they saw fit. This "special instruction," therefore, rendered any chance of the jurors misinterpreting the "factor (k)" instruction, so as to preclude consideration of any relevant mitigating evidence, *far less likely* than was the case in either *Boyde* or *Payton*. Belmontes' efforts to distinguish *Boyde* and *Payton* serve only to highlight the circuit court's flawed Eighth Amendment analysis in this case.

Indeed, this Court in *Payton* found that the California courts reasonably rejected an almost identical challenge to the "factor (k)" instruction even where the prosecutor repeatedly and improperly argued, with no curative admonition from the trial court, that the jurors were *forbidden* from considering *any*

of Payton's evidence in mitigation. *Payton*, at 1437-39. Unlike in *Payton*, the prosecutor in this case expressly told the jurors that they could and *should* consider Belmontes' "forward-looking" evidence of future institutional adjustment.

As was true in *Payton*, any finding that "factor (k)" did not encompass Belmontes' forward-looking evidence would require the "surprising conclusion that remorse could never serve to lessen or excuse a crime." *Payton*, at 1439. "[L]ike in *Boyde*, for the jury to have believed it could not consider [such] mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all" *-Id.* at 1440.

As discussed in the petition for certiorari, the Ninth Circuit's finding to the contrary rests on illusory distinctions of *Boyde* and *Payton* and on an unreasonable review of the record. This Court's supervisory intervention is necessary to correct the Ninth Circuit's errant legal judgment in this case and to ensure that such a faulty interpretation of federal constitutional law will not extend to future cases.

THE NINTH CIRCUIT'S OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE v. LANE*, 489 U.S. 288 (1989)

Belmontes also insists that the Ninth Circuit's opinion does not rest on a new rule but, instead, was somehow dictated by precedent predating the finality of his judgment. As discussed, however, the circuit court's opinion clearly turns on the sufficiency of the "unadorned factor (k)," and there simply was no authority, extant at the time Belmontes' judgment became final, to question the constitutionality of that instruction or, for that matter, any similar instruction. There certainly was no precedent at the time Belmontes' judgment became final which would have dictated the conclusion reached by the Ninth Circuit in this case. *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288.

Belmontes' contrary argument rests entirely on authority dealing with the permissible scope of potentially mitigating evidence in capital cases.[2] None of those cases address the

---

2. In support of this proposition, Belmontes cites *Eddings v. Oklahoma*, 455 U.S. 104, 112-117 (1982) and *Lockett v. Ohio*, 438 U.S. 586, 606-609 (1978), which both stand for the simple proposition that a state

constitutional requirements of jury instructions with respect to any such evidence. The first case on this point, *Boyde*, was issued *after* Belmontes' judgment became final (*see Belmontes v. California*, 488 U.S. 1034 (1989)), and that case *confirmed* the constitutional sufficiency of the very instruction at issue here.

Belmontes' cited cases, therefore, are all far too general to dictate, as per the controlling requirements of *Teague*, the alleged instructional error found by the circuit court in this case. *See Gilmore v. Taylor*, 508 U.S. 333, 343-344 (1993); *Sawyer v. Smith*, 497 U.S. 227, 235 (1990). Instead, the circuit court has interpreted these prior cases, explicating the overriding Eighth Amendment requirements of what a factfinder *may be allowed to consider* in capital cases, into an unpredictably "novel" constitutional mandate regarding what jurors must be told in their instructions. *Stringer*, at 228; *Butler*, at 414-15.

Belmontes seeks to distinguish *Boyde* and *Payton* to impose instructional requirements never contemplated in any controlling authority at the time his judgment became final. Such a requirement is not only inconsistent with *Boyde* and *Payton*, but it also violates the non-retroactivity doctrine of *Teague*. For this reason as well, Petitioner submits a writ of certiorari should issue in this case.

---

may not affirmatively *prevent* a jury from considering relevant evidence in mitigation. Belmontes also cites *Skipper v. South Carolina*, 476 U.S. 1. As explained in the petition for certiorari, this case too merely involved the exclusion of mitigating evidence and did not address anything with respect

CONCLUSION

Accordingly, Petitioner respectfully requests that this Court grant the application for certiorari in this matter.

Dated: February 3, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MANUEL M. MEDEIROS
State Solicitor General

DONALD E. DE NICOLA
Deputy State Solicitor General

MARY JO GRAVES
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

MARK A. JOHNSON
Asst. Supervising Deputy Attorney General
Counsel of Record
Counsel for Petitioner

drb
30085521.wpd
SA2006300169

(6)

No. 05-493

FILED
JUN 19 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

ERIC S. MULTHAUP
Counsel of Record
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
Telephone: (415) 821-6000
Facsimile: (415) 389-0865

CHRISTOPHER H. WING
1101 E Street
Sacramento, CA 95814
Telephone: (916) 441-4888
Facsimile: (916) 441-1575

Counsel for Respondent

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
DONALD E. DE NICOLA
Deputy Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
MARK A. JOHNSON
Assistant Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Facsimile: (916) 324-2960

Counsel for Petitioner

RECEIVED
JUN 21 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Petition For Certiorari Filed October 12, 2005
Certiorari Granted May 1, 2006

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE

INDEX

Page

Chronological List of Relevant Docket Entries 1

Excerpts from the Reporter's Transcript on State Appeal:

Defense Penalty Phase Evidence 4

Penalty Phase Instruction Conference 117

Prosecution Closing Argument 146

Belmontes' Allocution 161

Defense Closing Argument 165

Court's Instructions 174

Juror Questions and the Court's Responses 188

Proceedings Regarding Rereading Testimony 192

Jury's Entry of Verdict 199

Relevant Portions of Appellant's Opening Brief to the United States Court of Appeals for the Ninth Circuit, Case Number 01-99018 207

Relevant Portions of Appellee's Brief to the United States Court of Appeals for the Ninth Circuit, Case Number 01-99018 215

Relevant Portions of Appellant's Reply Brief to the United States Court of Appeals for the Ninth Circuit, Case Number 01-99018 224

Respondent's Motion for Rehearing and Suggestion for Rehearing En Banc to the Ninth Circuit, Case Number 01-99018 236

Appellant's Opposition to Motion for Rehearing and Rehearing En Banc 253

INDEX – Continued

Page

Ninth Circuit Order of August 2, 2005, for Parties to Submit Briefing Regarding Rehearing En Banc 267

Respondent's Brief in Response to the Ninth Circuit August 2, 2005, Order 268

Appellant's Brief in Response to the Ninth Circuit August 2, 2005, Order 281

Order of the Ninth Circuit Denying Rehearing En Banc, filed October 24, 2005 290

The following opinions, decisions, judgments, and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the appendix to the Petition for Certiorari:

Opinion, California Supreme Court, filed June 23, 1988 (Pet. App. A) 147a

Memorandum of Opinion and Order, United States District Court, Eastern District of California, filed August 15, 2000 (Pet. App. A) 101a

Order and Amended Opinion, United States Court of Appeals for the Ninth Circuit, filed July 15, 2003, amended November 20, 2003 (Pet. App. A) 1a

Order, United States Court of Appeals for the Ninth Circuit, filed February 5, 2004 (Pet. App. A) 85a

Opinion, United States Court of Appeals for the Ninth Circuit, filed July 15, 2005 (Pet. App. A) 230a

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

November 4, 1994 – Fernando Belmontes filed his Second Amended Petition for Writ of Habeas Corpus in the United States Court for the Eastern District of California.

May 14, 2001 – District Court Judge David F. Levi issued a Memorandum, Opinion and Order denying habeas corpus relief.

October 9, 2001 – Judge Levi issued an Order granting Belmontes' application for a certificate of appealability as to various claims.

December 5, 2002 – Belmontes' Appeal was argued and submitted to Judges Stephen R. Reinhardt, Diarmuid F. O'Scannlain, and Richard A. Paez, Circuit Judges.

July 15, 2003 – The Ninth Circuit Panel filed an Opinion, reversing in part and affirming in part, with a partial concurring and partial dissenting Opinion issued by Judge O'Scannlain.

July 28, 2003 – The Warden of the California State Prison at San Quentin (hereinafter "Warden") filed a Petition for Rehearing and Petition for Rehearing En Banc.

August 19, 2003 – Circuit Judge Reinhardt issued an Order directing Belmontes to file a response to the Petition for Rehearing and Petition for Rehearing En Banc.

September 9, 2003 – Belmontes filed a response to the Petition for Rehearing and Petition for Rehearing En Banc.

November 20, 2003 – The Ninth Circuit Panel filed an Amended Opinion, superseding the July 15, 2003, Opinion but making no substantive changes from the earlier Opinion.

February 5, 2004 – The Ninth Circuit Panel filed an Order Denying Rehearing; a majority of the Ninth Circuit issued an Order Denying Rehearing En Banc, with dissents filed by Circuit Judges Diarmiud F. O'Scannlain, Consuelo M. Callahan, Stephen S. Trott, Andrew J. Kleinfeld, Ronald M. Gould, Richard C. Tallman, Jay S. Bybee, and Carlos T. Bea, with respect to the denial of en banc rehearing.

February 17, 2004 – Judge Reinhardt granted the Warden's Motion to Stay the Mandate for 90 days pending the Warden's filing of a Petition for Writ of Certiorari in the United States Supreme Court.

April 30, 2004 – The Warden filed a Petition for Writ of Certiorari in the United States Supreme Court in case number 03-1503.

March 28, 2005 – The United States Supreme Court granted the Warden's Petition for Writ of Certiorari in case number 03-1503 and remanded the matter to the Ninth Circuit with an order for further consideration in light of *Payton v. Brown*, 544 U.S. __ (2005)

July 15, 2005 – The Ninth Circuit Panel filed an Opinion, authored by Judge Reinhardt, reversing in part and affirming in part, with a partial concurring and partial dissenting Opinion issued by Judge O'Scannlain.

July 19, 2005 – Judge Reinhardt granted the Warden's Motion to Stay the Mandate for 90 days pending the

Warden's filing of a Petition for Writ of Certiorari in the United States Supreme Court.

August 2, 2005 – Judge Reinhardt issued an Order for both parties to file briefing setting forth their respective positions as to whether this case should be reheard en banc.

August 23, 2005 – Belmontes filed his brief pursuant to the Ninth Circuit's August 2, 2005, Order.

August 24, 2005 – The Warden filed his brief pursuant to the Ninth Circuit's August 2, 2005, Order.

October 24, 2005 – A majority of Ninth Circuit Judges declined to entertain en banc rehearing in this matter.

[2199] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	No. 32183
vs.	)	Dept. No. 7
FERNANDO BELMONTES,	)	
Defendant.	)	

The above-entitled matter came on regularly for hearing on Friday, July 30, 1982, at the hour of 10:17 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098
and JOHN SQUIRES, C.S.R. No. 2001

* * *

[2312] THE COURT: Mr. Schick?

MR. SCHICK: I stated my position on the record prior.

THE COURT: Stand admitted.

(Whereupon People's Exhibits Numbers 30 and 31 were received in evidence.)

MR. SUEYRES: People rest.

THE COURT: Mr. Schick.

MR. SCHICK: My first witness, Judge, will be Michael Salvaggio, please.

Mr. Salvaggio, come up this way please, sir. Come through the swinging gate and over by the court reporter.

Stop right there and raise your right hand, sir, the clerk will swear you in.

MICHAEL SALVAGGIO,

called by the Defendant, having been sworn, testified as follows:

THE COURT: Right up here please, sir.

We'd ask you state your full name for the record, please.

THE WITNESS: Michael Salvaggio, S-a-l-v-a double g-i-o.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Salvaggio, what is your current residence address?

[2313] A. My residence?

Q. Yes.

A. 841 Vesta (phonetic) Street, Ontario.

Q. Ontario, California?

A. Right.

Q. How long have you lived there?

A. About 25 years.

Q. And are you currently employed?

A. I'm a car dealer.

Q. Self-employed?

A. Yes.

Q. How long have you been in that business?

A. Since 1946.

Q. Are you related in any way to the young man seated to my right, Fernando Belmontes?

A. It is my grandson.

Q. And through which of his parents are you related to him?

A. Which of my parents?

Q. To which of his parents?

THE COURT: Is he the son of your daughter?

THE WITNESS: Yeah, son of my daughter.

MR. SCHICK: Your daughter?

A. Right.

Q. I assume you've known Mr. Belmontes, Jr. for most of his life?

A. That's right.

Q. Where did you grow up?

[2314] A. Pardon me?

Q. Where did you come from before you came to California?

A. From New York.

Q. Are you Mexican-American background?

A. No.

Q. What extraction?

A. I'm Italian.

Q. What about Mr. Belmontes' father, Fernando Belmontes, Sr., is he Italian also?

A. No, he was a Mexican.

Q. How old was your daughter when she and Mr. Belmontes, Sr. were married?

A. 16 years old.

Q. And was this done with your permission?

A. No.

Q. How long after they were married did Fernando Belmontes, Jr., was he born?

A. About a year.

Q. Okay. Did you have contact with your daughter and her family after Fernando Belmontes, Jr., was born?

A. All the time.

Q. Could you describe for the jury what the circumstances were like in the first few years?

A. The circumstances, you wouldn't believe it. He married my daughter. He ran away and got married. And he brought my daughter to where he was living and it was a chicken coop converted into a one bedroom home. That was their room that they lived in.

[2315] Q. Was he employed at that time?

A. No.

Q. Did you help him to gain employment?

A. I put him in business, yes.

Q. What sort of business did you put him in?

A. Well, I am a car dealer and I was – and I put him in for detailing cars and got him work for other dealers and stuff like that.

Q. And did that enable him to support his family?

A. He drank it away.

Q. Did you observe the home life of your daughter and Fernando Belmontes, Sr.?

A. Yes, I did. It was terrible.

Q. In what way?

A. First of all, they never had a place to live or anything. I did nothing but give them money.

Q. For what reasons did you give them money?

A. To live. He didn't want to work. The man never wanted to work at all. He always told my daughter that your dad has got money, and you go get it. Go get the money.

My wife, that is four years ago today, my wife died, I was married 38 years. My wife gave them all kinds of money. We wanted to have the divorce and Fernando, Sr., was always threatening my daughter. He broke her arms. He did all kinds of physical things to the girl.

Q. Did you ever personally observe this?

A. Yes.

[2316] Q. How many times did you see her with broken arms?

A. Broken arm, once. Marks on her body a lot of times.

Q. How long did the marriage between your daughter, Carol, and Fernando Belmontes Sr., last?

A. About nine years, I think. Nine or ten years.

Q. So Fernando Belmontes would have been about nine or ten years old?

A. Right. We had to go and plead his father when that fella was a little boy to take him out and take him places. He always had a hatchet over my wife's head and my head that we couldn't take him no place unless we gave him money or contributed to the home and this and that. I even bought a home for them.

Q. When was that?

A. I bought a home for them because they had no place to live and I thought that they would settle down and make a marriage. And he didn't. He never paid no rent. Never had no sense of responsibility or anything. Nothing.

Q. After he and your daughter were divorced, did she have another man in her life?

A. After she was divorced?

Q. Yes.

A. Yes, she married again.

Q. How long did that marriage last?

A. I think about three years.

Q. And how old would Fernando Belmontes Jr., had been when the second marriage broke up?

A. He was probably around 13, 14 years old.

[2317] Q. Between his – between Fernando Belmontes' Jr's., birth and his age of 13 or so, how would you describe your relationship with him?

A. Very close.

Q. What sort of things did you and your grandson do?

A. Well, we always was in contact with one another and stuff like that. And try to give him everything I possibly could. My wife resented the marriage from the time that they got married, and there –

Q. Why did she resent it?

A. Well, because the beatings my daughter and everything took and the house life they lived.

Q. How many children were there in the house?

A. In their –

Q. Yes, in their family.

A. Three.

Q. Who was the oldest?

A. Fernie.

Q. Fernie Belmontes?

A. Junior.

Q. Okay. And how many other children were there?

A. Well, there was a baby that died.

Q. How old was that baby when it died?

A. It was one year old. I buried the baby. And then there was Larry and then there was Shelley.

Q. And Larry and Shelley are now teenagers?

A. Yes.

Q. Okay. After Mr. Belmontes became a teenager and the [2318] second marriage broke up, did you have much contact with him at that point?

A. Well, really I didn't have too much contact with him. I was over his house one day and me and my wife, we stopped over and there was some kids over there on the lawn with cars and everything, and I told Fernie, I says Fernie, I says, what are all these kids doing around here?

Oh, it is all kids that I know and stuff like that. And I told Fernie, I says, Fernie, if you ever need anything come and see me, talk to me. And for some reason or another, I don't know why, he didn't do it.

Q. Are you aware that in 1979 he was sent to the youth authority?

A. Yes, sir.

Q. And was your wife still alive at that time?

A. Yes. Oh, I'm sorry, '79?

Q. Yes.

A. No, my wife passed away in '78.

Q. And after he was released, did you have any contact with him at that time?

A. No, I didn't. He was to my wife's funeral.

Q. Pardon me?

A. He was to my wife's funeral. It was four years today.

Q. He was at your wife's funeral?

A. Yes.

Q. Did he have a relationship with your wife?

A. Yes. My wife and him were very close.

Q. Did she die in any unusual way?

[2319] A. My wife –

MR. SUEYRES: I'll object to that. I don't see the relevance of that.

THE COURT: Overruled. You can answer the question.

THE WITNESS: My wife had an accident and she drowned in the swimming pool at home.

MR. SCHICK: Q. Was she in the hospital for a while?

A. The accident happened July the 17th and she was in a coma 'till the 31st. She died the 31st in my arms. I was married 38 years.

Q. Was Mr. Belmontes at the hospital at anytime while she was in a coma?

A. Yes. He came almost everyday.

Q. Have you had – you are aware of the facts of this case, Mr. Salvaggio, that your grandson stands convicted of?

A. Yes.

Q. Have you had an opportunity to recently talk to your grandson?

A. I talked to him about two weeks ago over the phone.

Q. That is the first time you've had contact with him in a few years?

A. Yes. I have another son. My son is in business with me, and from the time the children, I can honestly say it, my son gave his kids everything. And when we have a party or something at the house, a swimming party or something they would always throw their weight around, I got this and [2320] I got that. And when Carol used to bring the kids over, them kids had nothing. Shame to say you have two children and one has something and the

other one hasn't got nothing. And I always thought that they – they disliked them and I always used to tell the kids, don't throw your weight around. Your kids got something and Carol got nothing. She had no means of support.

I'm 64 years old. I've never been in no trouble. Never been arrested, and I was married 38 years. But Carol, my daughter, she ran away and got married.

I can go back, if you want me to. It will only take a minute. I can tell you something that I think this whole thing with my daughter might happened.

I moved here in 1957, came from a good home. I was always able to take care of my children and give them the best of everything. We was here a short time and my daughter was influenced by a couple of girls, a couple of Mexican girls. I came home and she had her suitcases packed. And I said, "Carol," I says, "what are you doing?"

She says, "I'm going to leave home. I'm going with the girls."

I says, "For what?" Just wanted to leave home.

So I gave her a spanking, which I think she deserved. Next day we was called into the police station, me and my wife in Ontario. They told me and my wife that we could not hit our children no matter what they done.

Q. What happened after that?

A. My daughter thought she was ten feet tall. We [2321] couldn't do nothing. She wanted a car and I says she was too young. She ran away and found Fernie's dad as a obsession. He was letting her drive the car and everything.

They ran away. They got married against our better judgment. The stories – I won't take up the Court's time because probably they wouldn't believe it, but my daughter was really a victim of a lot of circumstances same way as that boy I believe is, too, a victim of circumstances.

MR. SCHICK: I have no further questions.

THE COURT: Mr. Sueyres.

MR. SUEYRES: I don't have any questions, Your Honor.

THE COURT: Thank you. You okay?

THE WITNESS: Yeah.

THE COURT: You can be excused to go outside.

MR. SCHICK: Do you think he might remain?

THE COURT: I think so. If you wish to remain in the courtroom you may do so, Mr. Salvaggio.

MR. SCHICK: Next witness will be Carol Belmontes.

THE COURT: Carol Belmontes, please.

[2322] THE COURT: Mrs. Belmontes, come right up this way, if you will, please. Come right over here this way and raise your right hand and the clerk will swear you in.

CAROL BELMONTES,

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE COURT: Right up here, please. Would you give us your full name, please.

THE WITNESS: Carol Belmontes.

THE COURT: You have to speak up, Mrs. Belmontes.

THE WITNESS: Carol Belmontes.

THE COURT: All these people want to hear what you have to say.

This might be a little bit difficult. If you want to take a recess, well do so, okay?

THE WITNESS: Thank you.

THE COURT: The bailiff will get you a glass of water in the event that you need it.

You may proceed, Mr. Schick.

DIRECT EXAMINATION

BY MR. SCHICK: Q. What is your current residence address, Mrs. Belmontes?

A. 753 West Citrus, Colton, California.

Q. That's in Southern California?

[2323] A. Yes.

Q. How long have you lived in that area?

A. In the Colton area itself?

Q. Southern California area.

A. Oh. Since 1957.

Q. That's been in the general San Bernardino County area?

A. Um-hmm (affirmative).

Q. You're the mother to this young man sitting to my side?

A. Yes, I am.

Q. What is the date of Fernando's birth?

A. April the 10th, 1961.

Q. How long had you been married to his father when Fernando Belmontes, Jr. was born?

A. Approximately 11 months.

Q. And where were the two of you living at that time?

A. In Upland.

Q. How long did you remain married to Fernando Belmontes, Sr.?

A. Eleven and a half years.

Q. Now, was Mr. Belmontes of a different ethnic or racial background from you?

A. Yes, he was.

Q. What was his background?

A. He was Mexican-American.

Q. What about yourself?

A. I'm Italian.

Q. Was this marriage something your parents agreed to?

A. Agreed to?

[2324] Q. Yes.

A. No, sir.

Q. How old were you when you got married?

A. 16.

Q. Where did you get married?

A. In Las Vegas.

Q. Were you supported by your husband after your marriage?

A. No, not really.

Q. Did you and your husband have a happy life together?

A. No, sir.

Q. What about your son, you had been married 11 months when he was born?

A. (Affirmative nod)

Q. Have you had any other children?

A. Yes, I have four.

Q. How many of them are living?

A. Three. One daughter died.

Q. Could you describe for the jury the circumstances of the 10 years or so you spent with Mr. Belmontes, Sr.?

A. Rough.

Q. In what way?

A. He wouldn't ever work.

He was a drinker. He was an alcoholic.

Very violent person. I mean he used to beat me.

Q. What sort of beatings?

A. He broke my arm, he stabbed me. Just general beatings.

Q. How was your relationship with your son, Fernie, when you and Mr. Belmontes, Sr. were together?

[2325] A. My son and I have always had a very close relationship.

Q. What about his relationship with his father?

A. The children weren't happy. The only way I can say it is after I left their father, the children really didn't want much to do with him.

Q. What about before you left him?

A. It was always me that they came to. They couldn't go to him. Ninety-five percent of the time he was drunk.

Q. After you and Mr. Belmontes, Sr. were no longer together, did you remarry?

A. Yes, I did.

Q. And for how long did that marriage last?

A. Five years.

Q. How old was Fernie when the second marriage broke up?

A. Approximately 10.

Q. And you were the sole parent at that time?

A. Pardon?

Q. You were the sole parent at that time?

A. Sole parent?

Q. Yes, in the house.

A. No. Me and their stepfather.

Q. After the stepfather and you divorced, how old was Fernie then?

A. Approximately 15, 15 and a half years old. Then I was alone.

Q. Did you have any problems with your son after that point in time?

A. Not any problems, really, other than he – his [2326] stepfather was very, very strict, and Fernie wanted to go out and, you know, go with his friends and stuff. And it was just a little bit hard, you know, to make him come in the hours that he had been used to coming in. There was no man in the home. He was just a little bit hard, in that respect, to control.

Q. After Fernie was sent to the Youth Authority in 1979, did he come back to live with you thereafter?

A. No, he didn't.

Q. Okay. And did you have much contact with him at that point in time?

A. We always kept in contact, always by phone. We talked to each other all the time.

Q. You had regular contact while he was in the institution?

A. I visited him all the time, every weekend.

Q. How old are your other children at this time?

A. I have a son 20 and I have a daughter 15 and a half.

Q. How did your oldest son, Fernie, relate to your other children?

A. Just fine.

Q. Are they close?

A. Very close with his sister.

Q. This is the 15-year-old?

A. (Affirmative nod)

Q. Has she had contact with him since he's been incarcerated?

A. You mean now?

[2327] Q. Yes.

A. She talks to him on the phone every time he calls, she writes to him all the time.

Q. All right. And what about your son, have he and Fernie had contact?

A. Well, my other son doesn't live at home with me. He's on his own.

He does talk to him, like if he's visiting.

Q. So your daughter is the only one left at home then?

A. Yes.

Q. How would you view your relationship now with your son Fernie?

A. My relationship?

Q. Um – hmm (affirmative).

A. Same as its always been.

Q. What kind of qualities can you recommend to this jury as they consider his faith?

A. I don't believe that he should go to the gas chamber.

Q. Just because you're his mother?

A. No. I don't believe he did it.

Q. Are you aware of the facts of this case?

A. (Affirmative nod)

I know my son.

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres.

MR. SUEYRES: I have no questions.

THE COURT: All right. Thank you.

MR. SCHICK: May she remain in the courtroom, [2328] Judge?

THE COURT: Yes, she may.

MR. SCHICK: My next witness would be Robert Martinez.

THE COURT: Robert Martinez, please.

Mr. Martinez, come up this way, if you will. Come right through the swinging gate.

Raise your right hand, please, the clerk will swear you in.

ROBERT JOHN MARTINEZ,

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE CLERK: Thank you.

THE COURT: Right up here, please.

Would you give us your full name for the record, please.

THE WITNESS: Robert John Martinez.

THE COURT: Spell your last for me, please.

THE WITNESS: M-a-r-t-i-n-e-z.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Martinez, what is your current residence address?

A. 123 North Miramonte in Ontario, California.

Q. How long have you lived there?

A. I'd say a good seven, eight years.

[2329] Q. How old are you?

A. 24.

Q. Are you currently employed?

A. Ontario Daily Report. It's a newspaper company.

Q. What sort of work do you do there?

A. I'm a distribution supervisor.

Q. How many years have you worked for the newspaper?

A. Seven years.

Q. You're at that position now after those number of years?

A. Yes.

Q. Do you know Fernando Belmontes, Jr., seated to my right?

A. Yes, I sure do. I've known him for about six, seven years.

Q. When did you first get to know him? Were you in school?

A. Yeah, it was in school.

Q. You were both in school together?

A. Yeah, we went to school together. I met him at a girl friend's house. That's when I first met my wife.

Q. How long have you been married?

A. Since '77. Five years.

Q. Do you have family?

A. Yeah, I have three kids.

Q. Was Mr. Belmontes involved in your wedding in any way?

A. Yeah, he was my best man.

Q. And have you and he ever worked together?

[2330] A. He worked there before, but that's before I took over the distribution department.

Q. At the newspaper?

A. Yeah, at the newspaper.

Q. When you knew about Mr. Belmontes, I take it it was in a social capacity; you were friends?

A. Yes, we were friends.

Q. And this was growing up together down in the Ontario area?

A. Yes. We hung around a lot.

Q. What sort of activities did you and he involve yourself in?

A. I used to have a Monte Carlo, a low rider. We used to work on it together.

We used to go riding around a lot.

Q. How many years did you and Mr. Belmontes hang out together before you got married?

A. A good four – four years.

Q. You did a lot of things together?

A. Yeah.

Q. Was he a close friend or just an acquaintance?

A. He was a real close friend.

Q. How often did you do things together?

A. We were together practically every day.

Q. When you got married, did you have much contact with him?

A. About a year after, and that was it. We would call each other occasionally.

[2331] Q. You've been married for about five years now?

A. Yes.

Q. Has he ever been of any assistance to you and your wife in your marriage?

A. Well, when I had problems with her, I would go talk to him. Somebody to talk to.

Q. And you're aware that Mr. Belmontes did some time in the Youth Authority?

A. Yes, I am.

Q. Did you have any contact with him after he came out of the Youth Authority?

A. He stopped by one time and he visited with us. He called me up on the telephone and told me that he was coming out.

Q. And that was about when; do you remember?

A. I would say about a year and a half ago, a year.

Q. That was the last time you had any contact with him?

A. That was the last time I had any contact with him.

Q. Overall, about how long a period of time then did you know him?

A. About eight years overall.

Q. Okay. Even after you were married, you and he did things together?

A. About a year after, yeah, we still hung around a lot together.

Q. How would you describe Mr. Belmontes as a friend?

A. I wouldn't describe him as a violent person.

Q. What sort of things did you do other than just riding [2332] around and going to social activities together?

A. We smoked marijuana occasionally and we drank beer, hung around the car club.

Q. That's about it?

A. Yep.

MR. SUEYRES: Your Honor, may I have the court reporter mark the transcript, please?

THE COURT: All right.

MR. SUEYRES: Thank you.

MR. SCHICK: Q. Was this on a once-a-week basis, or how often?

A. Well, we would get together at least three times a week.

MR. SCHICK: I have no further questions.

THE COURT: Mr. Sueyres.

MR. SUEYRES: Your Honor, I have a matter that I'd like to take up with the Court outside of the presence of the jury. We can try to do it at the bench, but I'd like it reported.

THE COURT: We'll take a short recess, ladies and gentlemen, while we go into chambers. We'll be with you in just a second.

[2333] You may step down, Mr. Martinez,

(The following proceedings were had in chambers:)

THE COURT: We are now presently in chambers with counsel. The defendant is present.

Mr. Sueyres.

MR. SUEYRES: Your Honor, I didn't want to say anything in front of the jury, obviously, but Mr. Schick asked a direct question concerning the defendant's character and elicited the response from the witness that Mr. Belmontes was not a violent person.

Obviously, Your Honor, counsel was well aware of all the witnesses I have lined up to testify to the contrary. And it may be that counsel just inadvertently slipped. So I'd suggest – I'd like to make a motion to strike and that the Court admonish the jury to disregard that question and answer of the witness. Otherwise, I intend to cross-examine him fully about his knowledge of other violent actions done by Mr. Belmontes.

He was arrested for 148 as a young man, tried to take the police officer's weapon away from him.

When he was 15 years old he carried a .38 revolver to school because he was having trouble.

He's been a member of the Black Angels gang in Ontario, California.

As well as his killing of Jerry Howard, which we've talked about at length.

I mean I'm entitled to question the basis of this [2334] young man's opinion that he's not a violent person, and I intend to do so fully and completely unless we erase it, so to speak, from the proceedings.

MR. SCHICK: I have no quarrel with that.

THE COURT: I'm going to have to allow him to go into the whole background if we don't do that.

MR. SCHICK: I have no quarrel with it.

THE COURT: All right.

MR. SCHICK: You can simply say that he doesn't have sufficient knowledge to make such an opinion, lack of personal knowledge.

THE COURT: The motion to strike is hereby granted and I will admonish the jury.

Thank you.

[2335] (Whereupon court reconvened in open court and the following proceedings were had:)

THE COURT: The record will reflect the jury is all present and accounted for. Defendant is present.

Ladies and gentlemen, I wish to at this point in time admonish you that Mr. Martinez' opinion that Mr. Belmontes is a nonviolent person is not to be taken into consideration by you at all. Court has made the determination Mr. Martinez does not have sufficient knowledge of Mr. Belmontes' background to make that determination and you are not to take it into consideration as to his opinion in your deliberations.

Mr. Schick, you have more questions?

MR. SCHICK: I don't believe I had any more questions. I don't believe – if Mr. Sueyres wished to cross-examine him –

MR. SUEYRES: I'd like to ask him one or two.

THE COURT: All right. Mr. Martinez, would you come back, please.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Martinez, at about what age was it that you met the defendant?

A. About 16. I was 16.

Q. You were 16?

Was he about the same age?

A. He was about 13.

Q. And at about what age was it that you stopped seeing [2336] him?

A. Nineteen, 20.

Q. Yours or his?

A. Mine.

Q. Okay. So he would have been about 16 or 17?

A. Maybe older.

Q. Thereabouts?

A. I'd say closer to 18.

Q. Okay. Well, in that amount of time that you did know him, I suppose it is fair to say he had other friends?

A. Well, we kind of stuck real close together.

Q. Were there things that he did when you weren't present? In other words, at times you would be apart, obviously?

A. Yes.

Q. Did you make any attempt to keep track of him?

A. Oh, we would talk a lot, yeah.

Q. All right. But in terms of what he did when you weren't around.

A. He would come over and talk to me and tell me his personal problems, like his girlfriends.

Q. I guess what I'm asking and it is so obvious that it is difficult to see, is that you weren't a detective or a parent or some kind of investigator. You weren't following him around to see what he was up to when you weren't there?

A. No.

Q. Then I take it that you had a bond of friendship there?

A. Yes.

Q. You had some regard for him and he for you?

[2337] A. Yes.

Q. And as a matter of fact, that is why you are here today is because he needs somebody to speak on his behalf, is that right?

A. Yes.

Q. Then I take it at some point when he was young you went your separate ways?

A. Well, he was older, not really young.

Q. All right. At some point you became employed and were working steady with the newspaper?

A. I was working steady with the newspaper even when I met him.

Q. All right. But you lost track of him or – even though you considered yourself a friend you didn't see him on a regular basis?

A. Well, when he went to YTS, after that that is when we kind of split apart.

MR. SUEYRES: All right. Thank you. I have no further questions.

THE COURT: Mr. Schick, anything further?

MR. SCHICK: Nothing further.

THE COURT: Thank you, Mr. Martinez. You may step down.

MR. SCHICK: Darlene Martinez.

THE COURT: You may stay, Mr. Martinez, if you wish.

Mrs. Martinez, come up this way if you will, please. Come over by the court reporter, please. We'd ask you stop [2338] right there and raise your right hand. The clerk will swear you in.

DARLENE MARTINEZ,

called on behalf of the Defendant, having been sworn, testified as follows:

THE COURT: Right up here if you will, please.

Would you give us your full name, please?

THE WITNESS: Darlene Carol Martinez, M-a-r-t-i-n-e-z.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Miss or Mrs. Martinez?

A. Mrs.

Q. You are married to Robert Martinez?

A. Yes, I am.

Q. Who just testified?

A. Yes.

Q. How long have you and Robert been married?

A. Five years.

Q. And do you know Fernando Belmontes, Jr., young man seated to my right?

A. Yes, I do.

Q. How long have you known him?

A. Six or seven years.

Q. And did you meet him first or your husband first?

[2339] A. To the best of my knowledge, I met my husband first.

Q. Okay. And you got to know Fernie through Robert?

A. Yes,

Q. And have you been close friends or just acquaintances over the years?

A. Close friends.

Q. Okay. Is your husband a closer friend than you?

A. Yes, he is.

Q. Did you ever do things together with Fernie?

A. With my husband – I mean, no just me and Fernie. With my husband and Fernie and I, yes.

Q. Did you have any contact with Fernie after he was released from the youth authority?

A. Yes, I did.

Q. Do you remember anything about that contact?

A. Yes, When he first got out he called us and I had talked to him on the phone approximately a half hour to an hour.

Q. Did you get together and meet with him?

A. Yes, he came to our house.

Q. Did anything happen at that meeting that you recall?

A. Yes. He told me that he had accepted the Lord and he was a born – again Christian.

Q. Did that have any special meaning to you?

A. Yes, it does.

Q. Why is that?

A. Because I'm a born – again Christian, too, and when I saw him I just – he came in and he hugged me and I hugged [2340] him and it was just – there was just a softness in him, a peacefullness.

Q. Is this different than what you had seen before?

A. Yes.

Q. Is that the last time you saw him prior to today?

A. Yes, it is.

MR. SCHICK: I have no further questions.

THE COURT: Mr. Sueyres.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. That would have been in approximately September or October of 1980 that he contacted you?

A. Yes.

Q. Did he talk about what he – where he was living at that time?

A. I can't remember where he was living.

Q. When you saw him, was that in Southern California?

A. Yes, it was.

Q. Did he talk to you about having lived in a halfway house in Oakland?

A. Yes.

Q. Tell you that he had only lived there a week or two? Did he mention that to you?

A. I can't remember.

Q. Are you also acquainted with Barbara Murillo?

A. I've met her once or twice.

Q. All right. Were you aware that Mr. Belmontes was [2341] living with Barbara Murillo started about the end of 1980 and the first part of 1981?

A. Yes.

Q. All right. So that would have been after he talked to you?

A. Yes.

Q. All right. You also knew the defendant or Mr. Belmontes in 1979, obviously.

A. Yes.

Q. All right, Did he talk to you then about how he had accepted the Lord?

A. No.

Q. Did he explain to you then that he was attending a particular church then?

A. No. The first time I heard about he was into some church is when he had contacted me – us after he had just got out.

MR. SUEYRES: Excuse me just a moment.

Q. Were you aware that in 1979 that he was attending Soldiers For Christ Church several times a week?

A. No, I wasn't.

Q. All right. This would have been about the same time as that or shortly before he got in trouble in 1979 and had to go to the youth authority.

A. No.

Q. All right. Since that time in September or October of 1980, have you ever talked to him about his religious conversion or preference?

[2342] A. We have had no communications since then.

MR. SUEYRES: Thank you. I have no further questions.

THE COURT: Mr. Schick?

REDIRECT EXAMINATION

BY MR. SCHICK: Q. Mrs. Martinez, you indicated you were aware Barbara Murillo was going to be living with Mr. Belmontes?

A. Yes.

Q. Did that cause you any concern?

A. Yes. Me and Fernie, as I said when we talked on the phone he was concerned because she wasn't a Christian and the struggle he would have to – well, he would be going through.

Q. Did you have any personal acquaintance with that struggle?

A. Yes.

Q. How so?

A. With my husband. He is not a Christian. It is very difficult.

Q. Did you talk to Fernie about that?

A. Yes, we did.

Q. What did you tell him?

A. Just that I was in the same – I was in the same boat, and it was – it was very hard and that he would have, you know, trials and he would just have to pray for her.

MR. SCHICK: Nothing further.

[2343] THE COURT: Mr. Sueyres, anything further?

MR. SUEYRES: No.

THE COURT: Thank you, Mrs. Martinez. Thank you very much.

MR. SCHICK: Call Mr. Belmontes.

THE COURT: Mr. Belmontes, come forward, please.

She may remain in the courtroom?

THE COURT: She may, yes.

Raise your right hand, please.

FERNANDO BELMONTES, JR.,

the Defendant herein, having been sworn, testified as follows:

THE COURT: Right up here, please.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Belmontes, you've heard testimony this afternoon from your grandfather and your mother about certain incidents in your childhood, have you not?

A. Yes.

Q. What can you tell the jury about how those incidents affect what's happened here?

A. I can't really say how I was affected right now. I can't use it as a crutch to say I am in a situation right now, I'm here now because of that. But as I look back at it now it was pretty hard.

[2344] Q. What is some of your earliest memories of your childhood with your father, Fernando Belmontes, Sr., and your mother?

A. I remember that he used to hit her a lot, come home drunk. I always knew that he, my grandfather, was always trying to help us out because my father wouldn't do nothing.

Q. Did you attend school regularly growing up?

A. I had some problems when I was in earlier grade school. I would take my little brother to school and I'd take off from school myself.

Q. Why did you do that?

A. I didn't like school. Couldn't understand it.

Q. Did you attend school regularly through high school?

A. No.

Q. When did you stop attending school?

A. In the 9th grade.

Q. Is there any particular reason for that?

A. Not really. I just didn't feel it was doing anything for me. I wanted to get a job or something, help out my mother. She was by herself.

Q. When you stopped going to school your father had left the home?

A. Yes, he was gone.

Q. What about your step-father?

A. He wasn't there.

Q. Okay. How would you describe your relationship with your father?

A. Not too good. He is my father. He has his problems. [2345] He had a lot of problems. I didn't associate with him too much. I didn't like him drinking. I didn't like him around me while he was drunk or drinking. He just had his problems and he wouldn't take care of him himself. He wouldn't do nothing for himself to better his life. He liked the way he was. I didn't. So if he was going to be like that, you know, I didn't want him around me.

Q. Have you seen – your father died recently, did he not?

A. Yes.

Q. When was that?

A. January 30th.

Q. Of this year?

A. Yes.

Q. While you were in custody?

A. Yes.

Q. Did you see your father before he died after you were arrested?

A. I seen him one time when I had barely gotten out of YA.

Q. That would have been back in 1980?

A. It was in the beginning part of November.

Q. Of 1980?

A. Yes.

[2346] MR. SCHICK: Q. And did he have regular contact with you after your mother and he separated and divorced?

A. He used to come and visit us. He had visitation rights. He would take us out on Sundays for the day. A lot of times we didn't go with him. When there was nothing else to do, we would go with him. That's about it.

Q. And did you involve yourself quite a bit with your mother during that time period?

A. Yes. I wanted to help her out. I thought I could help her out. I was too young.

Q. How would you describe your relationship with your grandfather?

A. As of right now?

Q. As you look back upon it growing up.

A. While he was growing up, we were close. He was always there to help us. He was always there when my mom needed help, when things weren't going right with her and my father.

As I started growing up, I started going into my own thing, kind of shied away, strayed away from him. I kept in contact with him a few times. I was there when my grandmother was in the hospital.

Q. Now, you were sent to the Youth Authority in 1979?

A. Yes.

Q. And where exactly did you get sent?

A. When I got committed?

Q. Um-hmm (affirmative).

[2347] A. To YTS, Youth Training School in Ontario.

Q. From there where did you go?

A. To a camp, Pine Grove.

Q. Where is Pine Grove located?

A. About 11 miles above Jackson, California.

Q. What sort of facility is Pine Grove?

A. It's a fire camp.

Q. Do the wards there do anything special?

A. It's a minimum security part of Y.A.

You fight fires during fire season.

You go out daily working on crew.

It's just a minimum security youth authority.

Q. When did you get sent there?

A. October 24th, 1979.

Q. When were you released from Pine Grove?

A. October 14th of 1980.

Q. So you were there just about a year?

A. Yes.

Q. And most of your time there was spent fighting fires and doing other work?

A. Yes.

Q. How many people were there at that facility?

A. That facility? The maximum was about 85.

Q. How many on your particular crew?

A. The maximum of the crew would be 21, but at different times there was between 13 and 21 on the crew.

Q. Was that crew rated in any way by the supervisors or counselors?

[2348] A. Yes, depending upon your work, your program there.

Q. Is that rated like from one to 20, or whatever the number was on the program?

A. Yeah. Well, like number one man, they have more responsibility on the crew. Number two man, and then so on down the line. After about number three man there's no responsibility; just a regular crew member.

Q. You got there in October of 1979?

A. Yes.

Q. What was your ranking at that time?

A. Last man.

Q. How long did you stay there?

A. Approximately five months.

Q. Did other people pass you up?

A. Yes.

Q. And you stayed last man?

A. Yes.

Q. Did anything happen during the course of that year –

A. Pardon me?

Q. Did anything happen during the course of that year to change your performance?

A. At first I was just doing a regular program.

Then they have this program called M-2 sponsors. It's a Christian program. Members of a church in Pine Grove, the Pine Grove Community Church, are the sponsors. You're matched up with a family and you're allowed to go out of camp with them, spend time with them.

Q. What sort of time?

[2349] A. The whole weekend. Like on Saturdays it was from – you could go – they could pick you up from twelve o'clock until 9:30 in the evening.

On Sundays, from 7:30 in the morning until 9:30 in the evening.

On weeknights it was from 4:30 until 9:30.

Q. Did you have any particular people you were paired up with?

A. Yes, I did.

Q. Who was that?

A. Bev and Fred Haro.

Q. Husband and wife?

A. Yes.

Q. What about the family, did the Haros have a family as well?

A. They have a son, a younger son, about 17; and two daughters, which are both married.

Q. Who all was living in the household?

A. Just Bev and Fred and their son.

Q. Was there any person who was a contact between the program and the institution where you were?

A. Pardon me?

Q. Was there any person who was a contact between the two, who went in the institution and set up the M-2 program?

A. Yes, the pastor of the church.

Q. Who was that?

A. Dale Barrett.

Q. Did you meet anybody else who was coordinating that [2350] program?

A. Don Miller.

Q. What was Mr. Miller's responsibility?

A. At the time he was just a sponsor for one of the wards in the institution.

Then he started – he became an ordained minister and started his own little branch of the M-2 sponsors.

Q. What sort of things did you do with the Haro family?

A. Everything. Go to the house, take me places to meet their relatives, all kinds of things.

Q. Did you get to know people in the church?

A. Yes.

Q. How big a church was it?

A. It was a big church.

Q. For how long did you keep contact with Bev and Fred Haro?

A. While I was in or this whole time?

Q. The whole time.

A. Since December 24th of '79 is when we were matched up, when they became my sponsors, until today.

Q. Why did you get involved in that program?

A. At first for a way to get out of camp. I didn't like the idea of being locked up. I thought it was just an escape to get out of camp and get away from everybody else.

Then I started seeing how Bev and Fred treated me. I couldn't realize or understand why people could feel that way about someone they really don't know. I got curious. I just started liking the way they lived, their outlook on [2351] life, their attitude, the way they felt towards everything.

I've tried everything else in my life and it never ever really worked out for me.

I started reading the Bible, studying the Bible with them.

They would help me along, show me things I did wrong or things I should be doing right.

In time I started serving the Lord while I was in.

Q. What happened after you got out?

A. I was released, and Don Miller set up this – before I could get paroled, he made arrangements with this parole house in Oakland, Exodus Brothers, a prison

ministry, a halfway house. He arranged for me to go there and be paroled to the house.

Q. Is that where you were paroled?

A. Yes.

Q. How long did you stay there?

A. Approximately two weeks, two and a half weeks.

Q. Now, when you were sent there what did you do? Did you have a job?

A. I had got a job the very next day at the Home of Peace, which is a – it's a missionary home. People from all over the world stay there while they're in the United States. They have like a little warehouse on the side where they box and crate the furniture and barrel the furniture or clothes and take the stuff to the docks to be shipped to wherever they're going.

Q. You worked there?

[2352] A. Yes, I did.

Q. How long did you stay working there?

A. About two and a half weeks.

Q. Why did you leave?

A. The home?

Q. Yeah.

A. When I got there, I really enjoyed it, it was nice, the fellowship with everybody. They mostly were ex-convicts just starting over a whole new life on the streets

again. I enjoyed it there. But as I started getting my paychecks and everything, they started more or less requesting that I pay all the bills that were there since I was the only one working.

Q. How many people were in the house?

A. Three.

Q. Three people?

A. Yes, three, and then one more was staying there on and off.

Q. Where was Barbara Murillo at this time?

A. In Southern California.

Q. Had you had any contact with her or from her after you were released?

A. Yes.

Q. Was she receiving any money from you?

A. No. I was saving it up so when we did get together we could get an apartment together.

Q. When you left the program there, where did you go?

A. Back to Southern California.

[2353] Q. And who did you see down there?

A. Barbara, my daughter, Barbara's mother, my parents.

Q. Had you seen your daughter before?

A. Before this?

Q. Um-hmm (affirmative).

A. I seen her when she was first born, while I was in YTS. Then I got moved to the camp, and I seen her one time.

Q. Did you and Barbara make any plans when you got together down in Southern California?

A. I planned on taking a job with the federal government that I had been offered while I was in camp.

Q. What was that job?

A. Federal government, forestry.

Q. The same work you had been doing while you were at Pine Grove?

A. Yes.

I planned on coming back up. We planned on getting an apartment. Her mother said she would bring us to Lodi and help us get an apartment together here, and then I would go back to Oakland and get my board plans changed to here.

[2354] MR. SCHICK: Q. Now, did you ever live in Lodi before?

A. No.

Q. Why did you select Lodi?

A. Close to Bev and Fred, to the church and to where I would be working. Away from everybody else, my neighborhood.

Q. Your neighborhood where?

A. In Ontario.

Q. And you and Barbara then got a place?

A. Yes.

Q. Where was that place? What was the address?

A. Address? 416 East Locust.

Q. Okay. Was that near Bob Bolanos?

A. Across the street.

Q. That is how you met him?

A. Yes.

Q. Was it an apartment house that the two of you lived?

A. Yes.

Q. When did you first meet Bolanos?

A. I can't really remember. About –

Q. When did you and Barbara first move to Lodi?

A. Well, she got up here December 23rd.

Q. Of what year?

A. '81.

Q. '80 or '81?

A. '80. Yeah, '80.

Q. And is there any particular reason why you had been [2355] offered that job?

A. Because of my – the way I worked while I was in camp.

Q. You said you were bottom of the class for a while. Where did you end up when you were released?

A. Number two man.

Q. How long did it take you to work from the bottom to the number two position?

A. Not very long when I started acting right, straightened my head out.

Q. So you and Barbara then were living together at the apartment?

A. Yes.

Q. And what about your religious commitment that you had made? What happened when you and Barbara were living together?

A. Things just didn't go my way. I couldn't deal with it. I just started having problems. Started going back to my old ways.

Q. Do you still spend any time reading the Bible?

A. Yes.

Q. I don't see you bringing it to court or whatever.

A. I read the Bible. Right now I don't feel it would be right. I don't want to be a hypocrite.

Q. What do you mean by that?

A. I tried it before. It worked. It was a beautiful life and everything. I couldn't deal with it. I couldn't dedicate

myself fully when I got out. A lot of different pressure on the streets than on the outside. I feel I got [2356] arrested and got involved in this without him or without walking that life so I'm got going to use it as a crutch to get myself out of it.

Q. Are you saying you've given up your belief?

A. No, I haven't given up. I just don't feel right saying that I'm dedicated one hundred percent, because I'm not. I still read the Bible and I believe in the ways. I just don't feel it is right right now.

Q. When would it be right?

A. Pardon me?

Q. When would it be right?

A. Whenever I could rededicate myself fully to it, to the life.

Q. What would it take to do that?

A. Just give up everything I'm involved in. Just my ways of life right now, which are different than the ways that the Bible says you should live.

Q. Has your belief in anyway helped you through this experience of being put on trial?

A. This trial right now?

Q. Uh-huh. (Affirmative)

A. How do you mean?

Q. Has it been of any help to you?

A. Yeah. Well, I feel I can deal with it. I feel more, you know, more at ease.

Q. Why?

A. Because I know what is going to happen. I know what happened in this crime. The judgment here doesn't really [2357] affect me. Doesn't mean nothing to me.

Q. Why is that?

A. Why should it? This is only my life, I mean, you know, they can mess with my life or take my life if they want here on earth, but I still believe when judgment day comes and I do go before the Lord he knows what happened in this crime and I believe I'll get a fair judgment then. So I'm not worried about this one right here.

Q. Do you feel that you can contribute to society in anyway if you are not put to death?

A. From an institution? From a penitentiary?

Q. Yes, from inside an institution knowing that could be 50 to 60 more years?

A. I don't know. Depends on how you want to present yourself in the penitentiary. There is – it is wrong from the beginning being in a penitentiary, but it is on how, you know, how you live your life in there. You can be –

Q. What do you mean by that?

A. You can be a screw up and mess up a lot or just mind your own business and do your own thing. It depends on your outlook. If you have a goal for yourself that you want to, you know, try to fulfill, then more or less you'll be occupied about that goal instead of out messing around.

Q. Have you thought about any goals you wish to pursue or achieve if you are in prison for the rest of your life?

A. A goal for myself?

Q. Yeah.

A. There isn't really too many being in a penitentiary. [2358] I'd like to get into music.

Q. What sort of music?

A. All kinds.

Q. Have you ever been involved in music before?

A. Yes.

Q. What have you done with your time in the 17 months you have been in the county jail?

A. What have I done with my time?

Q. Yeah.

A. Wait for this. Prepare myself.

Q. Do you have any hobbies?

A. I draw. Make picture frames out of cigarette packs. Sleep. Watch TV. Ain't too much you can do inside.

Q. Do you read at all?

A. Yes, read a lot.

Q. What sort of things do you read?

A. All kinds of novels.

Q. What would you do with the next 50 to 60 years of your life if you were in prison?

A. It is hard to say. Ain't too many opportunities in there, too many things you can do except try to stay alive. I don't know. Just try to stay alive.

Q. What sort of things do you want to do with music?

A. I don't know. I'm not a musician myself, but –

Q. Have you ever been a musician?

A. I've played a few instruments in junior high.

Q. What instruments did you play?

A. Saxophone. Bass, cello, a cello. That is about it.

[2359] Q. And what sort of things do you want to do with music?

A. I really don't know. I'd like to start playing the saxophone again. It all depends on yourself, if you just want to play a saxophone or if you want to really become something with a saxophone. Always an opportunity to reach the outside world through music, poetry, writing books, all kinds of things. That is about it.

Q. Do you want to be given the opportunity to do those things?

A. It would be nice. But like I say, you know, there is not really too much you can do. Being in prison is the same thing, you don't know whether you are going to die or not. You can't say – a man can't be sentenced to 15 to life and say he will be home in ten years. Ain't no telling who is going to walk up behind you and put a knife in your back. Can't really tell. All I can do is live for, you know, each day.

I'm not going to say I'm going to live that 50, 60 years or I won't be gassed, there is really no telling. Just live as long as I can.

Q. Are you asking for the opportunity to be given that chance?

A. Yes.

Q. And prepared to contribute in anyway you can to society if you are put in prison for the rest of your life?

A. If the opportunity is there, yes.

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres?

MR. SUEYRES: Yes. May I have just one [2360] moment, Your Honor?

(Pause)

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Belmontes, with respect to your Christian conversion, that opportunity in December of 1979 wasn't your first exposure to Christianity?

A. Yes.

Q. Well, do you recall telling Mona Terrell (phonetic), the probation officer in San Bernardino County in March of 1979 when you were being interviewed before your conviction of that felony, but when you were being interviewed about it, that you had found Christ with the Solders of Christ Church?

A. Did I tell her that?

Q. Yes.

A. She had a lot of questions about how I was living my life on the streets at the time. I may have said that. I don't know if I exactly said I found the Lord. I told her I was participating in church services there. A few times the pastor from the church came out and visited me also while I was there.

Q. You told her that a friend had turned on you to Christ.

A. Well, his life was about as bad as mine at the time before he found the Lord or dedicated his life to him. I couldn't see the change in him. He talked me into going to the church.

Q. Now, you are very frank with us that in December of [2361] 1979 when you were in the youth authority you saw the opportunity of going to the Haro household and participating in their church as an opportunity for you to leave the institution?

A. Yes.

Q. In other words, you used religion to get something for yourself, something that religion didn't have to offer but came along with it?

A. What do you mean, I used –

Q. You used religion –

A. Being a Christian.

Q. You told everybody you wanted religion, but what you wanted was an opportunity to get off the grounds.

A. At the beginning, yes.

Q. All right. And when you were released you were set up with a program in Oakland, the Exodus House. That is a religious halfway house, correct?

A. Yes.

Q. And before you could be paroled, you had to talk to the parole board about what your plans were and what you wanted to do, isn't that also true?

A. Yes.

Q. And so part of the plans that you had in mind to do were to pursue this religious experience?

A. True.

Q. And that is part of the reason or at least may have been part of the reason that you were paroled at all at that time?

[2362] A. No. I was paroled because my time was up. They couldn't keep me no more time without putting another beef on me, without charging me with something else. When I got to that camp I had exactly a year to do. They found no reason why I should be kept in the institution.

[2363] MR. SUEYRES: Q. And after you went to Exodus House, you were there two weeks and you were gone?

A. About that, two and a half weeks, somewhere around there.

Q. You went down to Ontario, California, and started living with Barbara?

A. Montclair.

Q. Or Montclair?

A. Yes.

Q. But you gave up the program and just went on down to Southern California?

A. Yeah. Well, I felt the program there wasn't something I could deal with. I didn't feel they were right.

I talked to the people who helped me with getting to this halfway house. I told them about my problem there. They really didn't say nothing about what I should do about it.

I didn't feel it was right, what they were expecting of me, the counselors from that home.

Q. And because you left without permission and because you left, you had to go back to the board and explain what had happened?

A. No, I didn't go back to the board. I went to the superintendent of the parole officers in Oakland.

Q. There was some discussion with persons of authority about what was going to happen now, since you had left when you weren't supposed to?

A. Not really. My parole officer was there, present with [2364] me, while we talked with the supervisor. She stated that she also was to blame for my leaving the area without having permission from the board because she told me when I first got out that I had the right – if I left the home, to leave a phone number and address so she could reach me. But she never told me that I couldn't leave the county.

Q. In essence, you said you thought it was okay for you to leave?

A. As far as I knew, it was, yes.

Q. All right. And you asked for another placement?

A. Another placement? Yes.

Q. Another placement or another chance at some kind of a program.

A. I just asked them if they could put me in another parole house.

Q. All right. That was Allied Fellowship?

A. Yes.

Q. Where was that?

A. In Oakland.

Q. How long did you stay there?

A. When I asked to go – when I went for that meeting with the supervisor and my parole officer, I asked them if I could get permission from the board to go back to Southern California.

They went ahead and placed me in Allied Fellowship until this board thing came back, which would have been about Friday. I was there about three days at the parole house, and the plan came back, and they granted me two more [2365] weeks in Southern California.

Q. And after that you moved to Lodi to live with Barbara?

A. Yes.

Q. You indicate you picked Lodi because it would be close to the Haros?

A. Yes.

Q. Wasn't there another reason for picking Lodi?

A. My job.

Q. And another one yet?

A. Not really.

Q. Wasn't Barbara's mother familiar with the Lodi area?

A. She was planning on moving up there.

Q. She's the one that rented the apartment for you and helped you and Barbara get set up there?

A. Yes.

Q. So it wasn't just religious attraction that brought you to the Lodi area; there were some very practical reasons?

A. Yeah, a good job.

Q. In other words, when you were in the Youth Authority you had been trained – at Pine Grove you had done this kind of fire fighting work and you had an opportunity to continue with it even when you were out?

A. Yes.

Q. It was also very convenient because Barbara's mother was heading up that way and she was going to help you with the very practical matter of setting up your

household, putting up the money to rent the apartment and so forth?

[2366] A. They knew about this job opportunity before I got out.

The foreman of this crew came to me while I was in camp and offered me this job, informed me that I had about maybe about a month and a half, two months before they would be hiring again, and that they were offering me a job.

I told him about my parole plans.

He said if it was possible to come back around here, to – that I would have a job.

Barbara's mother knew about this. She was planning on moving up to Lodi about three or four months after I came to the camp.

Q. You indicated in your direct examination that one of the things you noticed when visiting with the Haros while you were still in the institution was that you couldn't understand how they would treat you that way, treat you as well as they did, apparently, when you were someone that they really didn't know?

A. True.

Q. In other words, if it had been you, you wouldn't have done the same?

A. I really don't know. Never thought about it.

Q. Isn't it a fact, Mr. Belmontes, that you make a very definite distinction in your mind between people you know that are your friends and the rest of the world?

A. Not really.

While I was in jail, while I was in camp, in the Youth Authority, a lot of people feel different about convicts or inmates that are in. A lot of people don't want nothing to [2367] do with a person that's been arrested, ex-convict. As you know, it's kind of hard for an ex-convict to get a job right now, also. A lot of people don't like that.

I couldn't understand why these people or this program would come and take out a person who is arrested, you know, for, you know, what he's arrested for, but he's still incarcerated. But they would come and pick him up, take him out, show him a different way of life, share things with him. I didn't really think people were like that.

My peers are different from your peers, you know. Your people, your friends would be a lot different than mine.

Q. Well, you protect your friends, right?

A. Yeah, Friendship, yes.

Q. If they're not within the circle of your friendship, you don't care about them.

A. You can't trust too many people nowadays. A real friendship is something to really – I feel to cherish. There's not too many people that would really be your friend and be a devoted friend. A lot of people claim to be your friend and stab you in the back. There's a difference between friends and associates or acquaintances.

Q. What about Steacy McConnell?

A. She was an acquaintance.

Q. She was outside that circle, wasn't she?

A. No. She was in it.

Q. Going back for a moment to your religious experience, do you recall being arrested for that crime that ultimately [2368] you were sent to the Youth Authority on?

A. Yes.

Q. And that crime involved your admission to a court that you had in fact possessed the weapon involved?

A. I might have possessed the weapon.

Q. Do you recall – well, you did plead no contest?

A. Yes, I did.

Q. And the Court told you that that's for purposes of the criminal proceedings, an admission of guilt?

A. Yes.

Q. And you were asked if it was in fact true, and you plead guilty – pardon me – no contest, admitting that it was true?

A. Yes.

Q. That you had consealed that weapon, that evidence of a crime?

A. Well, at the time I told him that I might have possessed the weapon. So I just took the no contest.

Q. You heard Mr. Steven Cartwright, correct?

A. Yes.

Q. You had that weapon at that time?

A. Yes.

Q. All right. And when you were arrested, you were arrested by Sergeant John Donaldson of – Jake Donaldson –

A. Yes.

Q. (continuing) – of the Ontario Police Department?

A. Yes.

Q. And he talked to you about the basis for your arrest, [2369] didn't he?

A. Yes.

Q. As a matter of fact, that was the day after you had talked to Steven Cartwright?

A. Yeah.

Q. And he asked you if you had any guns?

MR. SCHICK: Judge, could we approach the bench for a moment?

THE COURT: All right.

(Conversation at bench)

[2370] THE COURT: You may proceed, Mr. Sueyres.

MR. SUEYRES: Q. Do you recall your answer to Mr. Donaldson?

A. Not exactly, no. It's been a while.

Q. You told him that your only weapon was your bible.

A. I don't remember. Like I say, it's been a long time ago.

MR. SUEYRES: Thank you. I have no further questions.

THE COURT: Mr. Schick?

MR. SCHICK: I have no further questions.

THE COURT: Thank you, Mr. Belmontes. We'll take a recess, ladies and gentlemen.

MR. SCHICK: Judge, unfortunately that is the last witness I have today. I didn't think it would take quite this short of time.

THE COURT: All right. We will then recess, ladies and gentlemen, for the evening. Do not discuss the matter with anyone during the course of the evening hours. We might be able to finish tomorrow, at the outside, Friday. I'm advised that Mr. Schick – Mr. Sueyres' wife will be delivering a child on Thursday and he's asked for the day off. So I granted him that pleasure. So hopefully we can finish tomorrow. Please return to the Court at ten o'clock and we'll try to get to it. Thank you.

(Whereupon the jury was excused at 2:58 p.m. and the following proceedings were had out of the presence of the jury:)

[2371] MR. SUEYRES: We had approached the bench before the last question of Mr. Belmontes, and rather than trying to reconstruct it later perhaps we should indicate on the record what that conversation consisted of.

THE COURT: The record should reflect that Mr. Schick had objections to Mr. Sueyres' pursuing the element of Mr. Belmontes' possession of a weapon and the questions with reference to that weapon, and Mr. Sueyres was allowed to pursue the matter without objection on the record by Mr. Schick concerning Mr. Belmontes' religious beliefs, and his response to the police officer when making inquiry as to whether or not Mr. Belmontes had a weapon. Mr. Belmontes' apparent response is my weapon is my bible.

MR. SCHICK: Basis of my objection as stated, Judge, was beyond the scope of direct examination on the record.

THE COURT: Yes. And Mr. Sueyres was allowed to go into it.

MR. SUEYRES: Thank you.

MR. SCHICK: Is it possible – Mr. and Mrs. Martinez are flying back tonight. Is it possible Mr. Belmontes have some sort of a short visitation in view of that fact?

THE COURT: I don't know where we can do that. Difficult security problem.

THE BAILIFF: I think if they go out to the jail they might allow them to visit.

THE COURT: Visit here in the courtroom?

[2372] THE BAILIFF: We'll be leaving in about 30 minutes.

THE COURT: Let them have a ten minute visit in the courtroom. Have all the deputies, they can do it here in the courtroom.

MR. SCHICK: Mother can visit at the jail?

THE BAILIFF: She might.

MR. SCHICK: Judge, could the Court order a visit for the mother and grandfather tonight?

THE COURT: I can order it, but you know what the jail does with my orders.

MR. SCHICK: They will only be here tonight.

THE COURT: We can order it, but they won't abide by it. I have much little power anyway, and none over the jail. We can put it in there.

THE BAILIFF: You want it on the dispo?

THE COURT: Let's put in the disposition sheet that the mother and the grandfather are here from out of town for the purpose of testifying and should be allowed to visit the defendant at the jail.

Mr. Schick, I have been advised by transportation there is a possibility they could confer with them in the holding cell conference room up on the third floor.

THE BAILIFF: All of them, so we will just exclude this then.

THE COURT: Yeah.

(Recess at 3:00 p.m.)

[2373] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	No. 32183
vs.	)	Dept. No. 7
FERNANDO BELMONTES,	)	
Defendant.	)	

The above-entitled matter came on regularly for hearing on Wednesday, August 4, 1982, at the hour of 10:51 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098 and JOHN SQUIRES, C.S.R. No. 2001

[2374] APPEARANCES OF COUNSEL:

CLARK SUEYRES, Deputy District Attorney, Courthouse, Stockton, California, appeared as counsel for and on behalf of the People.

JOHN SCHICK, Attorney at Law, 2027 Grand Canal Boulevard, Stockton, California, appeared as counsel for and on behalf of the Defendant.

– – – o0o – – –

[2375] THE COURT: Well, it's not 2:30. It's ten to 11:00.

I think some of you sat here. I apologize to you. We have a couple of judges on vacation. The workload has been doubling up.

I also forgot to tell you yesterday, since Judge Dozier is gone, he handles our commitments at the state hospital, and I have been filling in for him on Mondays, Wednesdays and Fridays. Today being Wednesday, I'm going to have to go to the state hospital on the 1:45. That calendar out there usually takes me about 45 minutes to an hour. I anticipate finishing up with that calendar today at approximately a quarter to 3:00, and we will try to reconvene, if we have to, at three o'clock. So I wanted to give you advance notice of that. I apologize to you once again. I spent this last six weeks making more apologies than I ever have in my lifetime.

For the record, the People of the State of California versus Fernando Belmontes, Jr. is called for further jury trial.

The record should reflect the jury is present, the defendant is present. We are now ready to proceed.

Mr. Schick, you may call your next witness.

MR. SCHICK: Reverend Dale Barrett.

THE COURT: Reverend Barrett, please.

Reverend Barrett, would you come right up this way, please, come right through the swinging gate, if you will. Right there is fine, sir. Raise your right hand and the [2376] clerk will swear you in.

DALE BARRETT,

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE COURT: If you'll take the seat right up here, please, sir.

We'd ask that you state your full name for the record.

THE WITNESS: Dale Barrett.

THE COURT: Spell your last for us.

THE WITNESS: B-a-r-r-e-t-t.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. What is your occupation?

A. Minister and chaplain at the California Youth Authority in Pine Grove.

Q. You are an ordained minister?

A. That is correct.

Q. How long have you been an ordained minister?

A. 14 years.

Q. In what faith were you ordained?

A. Evangelical Methodist Church.

Q. You're currently serving a church in the area of Pine Grove?

A. That's correct.

Q. Have you also during the course of your ministry been involved in prison chaplaincy?

[2377] A. Yes, for about 12 and a half years.

Q. In what institutions have you been involved in the course of those years, Reverend Barrett?

A. Mainly in Los Angeles, where I pastored for seven years and had a drug rehabilitation center and a halfway home in county jail situations, local court facilities.

Here presently at Pine Grove facility for about three and a half years.

Q. Okay. And during the course of your ministry have you come to know this young man seated to my right, Fernando Belmontes, Jr.?

A. Yes, I have.

Q. When did you first meet Fernando?

A. It would be hard for me to place the time that he was in our program. We've worked with about a hundred and seventy-five young men. But I would say approximately two years ago.

Q. Is there a particular name you give to this program?

A. The M-2 program.

Q. Were you involved at all in setting up that program?

A. Yes, I did.

Q. Could you explain what the basic function or purpose of the M-2 program is?

A. Yes, I will. M-2 stands for matching two, indicating one from our local church congregation, along with one with the institution.

We have done that with 175 young men.

There are certain freedoms that we have been allowed.

[2378] The M-2 program is contracted by the California Youth Authority to provide this function.

We take them into our homes. We have certain days. A normal family might be involved on a Wednesday night on a church service, on a Saturday all day after they have completed their functions in the camp from noon on, on a Sunday from nine o'clock until nine o'clock in the evening. During the duration of our services in their homes, they would visit and care for them at that time.

Q. Was Mr. Belmontes involved in the M-2 program?

A. Yes.

Q. Do you know the length of time he was involved in that program?

A. About a year.

Q. And did you involve or match him with anybody who belonged to your church?

A. Yes, I did. I matched him.

Q. Who were the people he was matched with?

A. Fred and Beverly Haro.

Q. That's a husband and wife?

A. That's correct.

Q. When did Fernando first get matched with Mr. and Mrs. Haro?

A. Well, there was a provision that they had to be in camp about 30 days. I would guess it was a normal situation. Probably he waited two or three months.

It was my decision, upon getting to know the young man – we hold a church service at the camp every week. I was [2379] down there several times a week. It was my responsibility to get to know the young men, based upon their proclivities, tendencies, interests, with a couple who I thought they might be compatible with in the church.

Q. You, in essence, make the match?

A. Correct.

Q. Did Mr. Belmontes come in contact with you thereafter during that year he was matched with the Haros?

A. Frequently. At least twice a week.

Q. Was this in an official or social capacity that you saw him?

A. Probably both.

Let me list several of the capacities.

He would have seen me as the chaplain at the facility for church services.

Secondly, he would have seen me as the pastor of the church in Pine Grove when he participated with his family.

They were have faithful sponsors. He was there on a very systematic basis.

I even saw him socially in the home of the Haros.

Q. When was your last contact with Mr. Belmontes?

A. It would have been just pursuant to his leaving the facility. I have not seen him since then.

Q. Okay. Was Mr. Belmontes involved in church activities?

A. Yes, to a high degree.

Q. How was he received by the members of the church?

A. Well.

And I would say of our participants in the program, he [2380] was one of the more sociable young men involved in the church.

Q. What sort of activities was he involved in?

A. He was involved in participating in church functions, primarily in attending.

As far as ministry or that sort of thing, that would have been limited by the nature of the program.

We did also participate in his baptism.

Q. Okay. When did his baptism take place?

A. It would have been towards the conclusion of his time with us. I would suppose somewhere along the three quarter mark.

Q. Now, do you baptize everybody who is –

A. No. A very small percentage.

Q. Who makes the decision about whether or not a young man is baptized?

A. It's made upon consultation with myself and that individual, based upon – I realize it's subjective, but how serious we feel they are about the commitment they have made.

It might be important for you to know our theology that precipitates the allowance of baptism. We do not see it as commensurate with church membership. We believe that baptism is a step that follows a commitment that a person makes in their lives to Jesus Christ. So we, on a subjective basis, upon the testimony of the individual, on some observation, some consultation with him, with camp personnel, how well he is doing in the program, we feel [2381] there are changes in the life-style if they have made that kind of contact, commitment.

So I think it's a very selective process. We have probably baptized less than 20 of the 175 young men in the program we've had.

Q. Do you recall the baptism of Fernando Belmontes?

A. Yes.

Q. Do you recall anything unusual about it?

A. It was an emotional time for him. It meant something very special to him. As is observed and as we participated in it together, it was something that he meant, as much as I could ascertain that from observation.

Q. You have been involved with convicts many years, I assume.

A. That's right.

Q. You know part of the meaning of the word convict is that people try to con you. Do you know what that word means?

A. Yes.

Q. What does it mean to you?

A. To try to manipulate for the purpose of incurring favor.

Q. You had an opportunity to observe Mr. Belmontes for about a year?

A. Yes.

Q. And you did agree to baptize him?

A. Correct.

Q. Did you feel that he was conning you?

[2382] A. No.

Q. Why not?

A. Well, again, it would be based upon my experience with I think a rather sizable group of men.

I will tell you in the M-2 program were reconciled to the fact that there are a high percentage of men who utilize the program for manipulatory reasons. They like the idea of getting out and being in homes. Who could blame them?

Our sponsors tend to pay very special attention to them, provide a home kind of enviornment for them while they're separated from their families. It would be a highly desirable thing to try to get into the program.

Many of them are guilty of trying to con families for favors.

There are many rules that go with the program. Many try to get the sponsors to bend the rules.

I know for a fact that was never Fernie's approach to the program.

Many would take advantage of the opportunities to go outside the facilities, but not be involved with us when we came on the grounds, which required some sacrifice because they would have to leave regular activities that they were pursuing, softball games.

Fernie was one of those exceptions who always came, even to the on-grounds activities.

Q. You're aware the reason we're here is following Mr. Belmontes' release he's now been convicted of a very [2383] serious crime?

A. Yes.

Q. You're aware of the background of that crime?

A. Yes, I am.

Q. You have not had an opportunity to talk to Mr. Belmontes since he's been released?

A. No, I have not.

Q. Do you feel that there's something incompatible with the fact that he could be convicted of such a crime after having gone through this –

MR. SUEYRES: Pardon me, Your Honor. That's completely objectionable.

THE COURT: The objection will be sustained.

MR. SCHICK: Q. Let me ask you this Reverend Barrett: Do you have any personal views with regard to the question of the death penalty?

A. Yes.

Q. What are they?

A. I believe in the death penalty.

Q. All right. Do you believe it should be applied in certain situations?

A. Yes, I do.

Q. You've been able to observe Mr. Belmontes for a period of time?

A. That's correct.

Q. As I said, you know the nature of the offense that he's been convicted of?

A. Correct.

[2384] Q. Do you feel that he is deserving of the death penalty?

A. No.

Q. Why not?

A. Well, you're going to ask me to call upon my subjective evaluation at this point. I acknowledge that at the outset.

I do feel that the point of premeditation in some of those things involved, which would be points that I would be in compatibility with the death penalty, are not existing in this case.

I see Mr. Belmontes as salvageable.

I see Fernie as a person with a lot of extenuating circumstances in his life to which I was privy in terms of our sharing and counseling together.

The enormity of the peer pressure and the kind of sociological circumstances that were part of his life I feel very conducive to some of the situations in which he found himself.

But I feel that, with regard to his character and his resolve, that – and the premeditation factor, that this is not an applicable punishment.

Q. Do you think that if he is behind bars for the rest of his life he can contribute in any way?

A. I'd like to think so. I'd like to think so, based upon the tremendous success that is being realized by a number of people involved in prison ministries. I'd like to feel that we are having a great deal of success.

Perhaps someone could say with regard to Fernie, "Do [2385] you feel you're a failure?" Obviously, this is not the result we would like to see.

About 80 percent of our young men in the program do well, stay out of trouble. The rate of recidivism has been

greatly affected by M-2 programming. I like to think we make a contribution to their lives and sense of well-being and self-image, and prison ministries can continue to contribute that to the lives of young men who have failed.

Q. Would you see yourself being involved in a prison ministry with Mr. Belmontes if he is in prison?

A. Yes, if the issue of proximity would be resolvable. If not, I would be anxious to direct others to him geographically on the basis of my associations.

MR. SCHICK: I have nothing further.

THE COURT: Mr. Sueyres.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Barrett – pardon me. Is it reverend? Is that the way you're addressed?

A. Dale is fine.

Q. All right. Okay.

Reverend Barrett, you do acknowledge that there is a high percentage of the people that are in your program that are there for what you described as manipulative reasons?

A. That would be my guess.

Q. And that's a risk you knowingly and willingly take because the purpose of the program is not to – well, the [2386] purpose of the program is to try to get people who have not yet seen Christ or come to Christ?

A. Are you asking my opinion if that's the purpose of the program?

Q. As I understand it. Is that right?

A. No. That is how we might interpret it in our own local circumstances.

The M-2 program not only matches people with quote Christians unquote, but with other people with other religious backgrounds as well.

If you would like me to be specific about my situation, yes, that would be a highly desirable part of our program.

Q. And I think, as I understood it, you were saying that while there's a high percentage of people in the program for the wrong reasons, if we may –

A. I think we're aware of that. We're not naive.

Q. But, in your judgment, Mr. Belmontes was there for the right reasons?

A. I believe so, in terms of how it was lived out in his day-to-day life-style.

Q. Do you admit or could you conceive the possibility that you may be wrong?

A. I think people's intentions are not always commensurate with the resultant acts that happen because of circumstances that contribute.

Is that an evasion of your question?

[2387] MR. SUEYRES: Q. No. Suppose –

A. I don't feel wrong about my original feeling about Fernie.

Q. Would your opinion be the same if you knew that he stated that his intentions in going into the program was to take advantage of the benefits or for the wrong reasons?

A. No, because I think that many men at the outset of the program do enter it for that reason but their motivation changes as they discover the other elements. Fact they are cared for and loved dispite of their failure. For many it opens up a whole new arena for experience and exposure. Most of them are from single parent families, divided family. Are not related to any kind of secure feeling.

So that may have been his original intent or could have been, very much conceivably, I would ascertain his motivation on the basis of the long range and duration of the program and his participation.

Q. Now, after he left the youth authority, or the institution, Pine Grove, that was the last you ever saw of him?

A. That I saw of him. I kept contact through the reports of his sponsors who did write him and hear from him from time to time.

Q. He never visited you at the institution?

A. No, They are not allowed to.

Q. Nor at your church?

A. They are not supposed to, and as far as I remember he didn't come back after that time.

[2388] Q. They are not allowed contact with you?

A. They are not supposed to return to the community where they have been incarcerated.

Q. Well, were you aware that he was working at the Pine Grove Forestry Camp?

A. While he was incarcerated?

Q. No, afterwards.

A. No, I guess not.

Q. In one of your – one of the questions you were asked, you were asked whether you were aware of the nature of Mr. Belmontes' present conviction.

A. Yes.

Q. From whom did you receive that information?

A. Heard from a variety of sources. I've heard it from – first, somebody at the local institution. I can't remember. That was my first point of contact.

I heard it from his sponsors. And, primarily, those have been the sources.

Q. Okay. No one has explained the precise jury verdict to you?

A. Well, I'm aware that he was judged guilty of first degree murder.

Q. Well, really it is – there is – you've expressed an opinion and it is premised upon certain assumed facts, and that is really want I want to go to, is that you were saying that you believe in the death penalty but you know the nature of this conviction. And –

A. I did not say –

[2389] Q. You believe there was no premeditation in this case?

A. From the information I have I feel premeditation is a debatable point at this point. My knowledge is obviously limited.

Q. Well – and that is the very point I have to make. You haven't read the transcript, I take it?

A. No, I haven't.

Q. Nor discussed the testimony of individual witnesses?

A. Not really.

Q. No, All right.

So in a sense, it is difficult for us to know upon what you base your information, whether it jibes with what the jury has been allowed to hear in this courtroom.

A. I guess I would say that I have known him for a year, whereas the jury has known him for the duration of this time they have had him here. And I think my relationship is built on a protracted period of time. So I'm talking about character and some of the things I have observed over an elongated period of time as opposed to a limited exposure.

Q. But do you – you have to admit, you really don't know for a fact what he has been accused of or convicted of?

A. Well, how factual would you like me to be?

Q. Well, your opinion is premised upon the fact that from your knowledge of him you don't believe premeditation could exist?

A. That's correct.

Q. So, if I – if you were told that premeditation did [2390] exist, your opinion would have to change, wouldn't it?

A. If you could convince me premeditation existed.

Q. Moving onto another area.

The views that have been solicited from you concerning the application of the death penalty in this particular case really seem to turn upon your ideas of rehabilitation. Would you say that is fair? Or the possibilities of rehabilitation?

A. I think it is a factor, a factor.

Q. Well, I think your statement was –

A. I'm not sure I understand your question.

Q. – you believe him to be salvagable.

A. Yes.

Q. Would you say that that is the key to your belief that the penalty is inappropriate here?

A. No. I really rather have you not tell me what I think and let me try to tell you what I think.

Q. I'm sorry, I don't mean to put words in your mouth.

A. I really feel with respect to the death penalty, my basic feeling is I see it as a deterrent to crime. I see it applicable in situations where premeditation is involved and the person determines that is what they are going to do before they expedite a crime.

But in terms of individuals where there are certain circumstances extenuating with regard to what happens, what are some of the factors that have contributed to their background and their character and this sort of thing and when they are salvagable, those things combined together, [2391] not taking any singular aspect, would probably contribute to my personal feelings.

Q. All right. And obviously, that is what was asked of you, was your personal feeling, and that is what you are giving us?

A. Yes.

MR. SUEYRES: All right. Thank you. I have no further questions.

THE COURT: Mr. Schick, anything further?

MR. SCHICK: No.

THE COURT: Thank you.

MR. SCHICK: He may stay now in the courtroom?

THE COURT: You may stay, yes.

MR. SCHICK: Next witness would be Don Miller.

THE COURT: Don Miller, please.

Mr. Miller, come right up this way if you will. We'ed ask you come over by the court reporter, please, sir. Raise your right hand and face the clerk, she'll swear you in.

DON MILLER,

called by the Defendant, having been sworn, testified as follows:

THE COURT: Come around over here would you please, Mr. Miller.

We'd ask you state your full name for the record, sir.

[2392] THE WITNESS: Don Miller.

THE COURT: Spell your last for me.

THE WITNESS: M-i-l-l-e-r.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Miller, what is your business or occupation?

A. I am a minister. I also am assistant chaplin at Preston, and I'm in the M-2 program, Northern California director.

Q. How long have you been involved in the M-2 program?

A. Approximately five years.

Q. What is your current work with that program?

A. I – my job at this point, we're doing mostly follow up after the people – fellas are released from prisons or all over California. We follow them up. Find employment. Kind of a big brother situation on the outside, to help them get back on their feet and make good citizens.

Q. Okay. Now, you know Reverend Barrett?

A. Yes.

Q. He is at the beginning of the program and you are after the ward is ready to be released from prison?

A. Right.

Q. And help them reintegrate into the community?

A. Yes.

Q. You know Fernando Belmontes?

A. Yes, I sure do.

[2393] Q. How long have you known him?

A. About – it would be about two years, two to two and a half, in that neighborhood.

Q. When did you first meet him?

A. I met him up at Pine Grove in the church from the program that's been working with the Pine Grove Camp. That is the first I've met him.

Q. Did you know him during the course of his stay at Pine Grove?

A. Yes, very much so.

Q. Did you come to know him through his participation in that church?

A. Yes.

Q. And were you involved at all in finding Mr. Belmontes a place after he was released from Pine Grove?

A. When he was released from Pine Grove it was a little bit hard to find a place we could put him. We found a halfway house in Oakland that would take him with some people that we knew that were involved in the prison ministry, both up at Vacaville and San Quentin and different places around.

Q. And what placement was he actually put into?

A. He was put into the Exodus House in Oakland. It is on the east side of Oakland.

Q. You are aware of what happened after he was placed in that program?

A. I have heard what happened. I was aware to a certain extent that he found a job with some forest service or [2394] parks or state over in the Lodi area and he moved over here.

Q. Okay, That he did leave that particular placement?

A. Yes, he left that place.

Q. Did you have any contact with him when he was living in Lodi?

A. In Lodi? No. Only by phone. Perhaps a couple times by phone, but no, I had no contact while he was living in Lodi.

Q. What sort of things do you do in terms of being involved in the institution with the wards through the M-2 program?

A. The purpose – as far as the institution at Preston, the purpose of what we do there is we go one on one with the fellows. We discuss with them the possibilities of after their release of getting back on their feet. Doing what will keep them out, keep them out of trouble, things like this. And then we follow that up at the time that they are released.

We are getting inot contact with their parole agent, wherever it is in California, and we work with him to help them find, as I say, a job, someone in the neighborhood that might have a job. A lot of times we use businessmen who will work with them, give them – help them get started back on their feet and keep them going in the right direction.

Q. Okay. Do you ever attend hearings for parole with wards you work with?

A. Very much so. When the boys are ready to be paroled [2395] from Preston and men are ready to be paroled from Preston I attend lots of times. Go and sit down with the parole agents and talk with them and discuss what the need is. Sometimes my feeling may be that I feel the fella is getting out a little bit sooner than he should and sometimes they'll keep him longer for that reason.

Q. Do you go to the actual hearing in which parole is going to be granted?

A. Yes,

Q. Did you go to such a hearing on Fernando Belmontes' case?

A. No, I didn't.

Q. Why didn't you?

A. Because I wasn't asked to and he was at Pine Grove and at the time he was at Pine Grove why we didn't do that as much as we are now. At this time we are doing considerable of it.

Q. Were you asked your opinion as to whether or not he should be paroled?

A. I would have, at the time he was paroled, I think I would have been just a little bit doubtful. I would probably have felt that he should have been, not necessarily incarcerated longer, but he needed, I felt, a little bit more orientation along some lines.

Q. What lines are you talking about?

A. Accepting authority and being able to adjust to the community on the outside. That is one of the problems with most of the men after they are released. It is hard to [2396] really adjust on the outside in a new environment. Just as hard as going in.

Q. In what way?

A. In the way – for example, we've taken them many times just before they are being released and we take them out to dinner. They don't know how to order because they've been told – for maybe five to ten years the food is set before them and that is what they eat. They need to know how to adjust to the community in that way. They also need to have – they need to understand the people

that they meet on the outside. That they stay with people who will show them a better life instead of getting back in with their old buddies.

Q. Since Mr. Belmontes was released, have you had any contacts with him?

A. Yes. I visited him in the county jail.

Q. How many times have you visited him?

A. Just – I think it was just once. We had fellows who visit in the county jail here all the time that have been seeing him considerably that are not exactly associated with us but we know each other and work together.

Q. Okay. And you are aware of why we're here today, that he has been convicted of a very serious crime?

A. Yes.

Q. You've had a chance to talk to him after he was arrested for that crime?

A. Uh – huh. (Affirmative)

Q. Do you feel you could work in any way with Mr. [2397] Belmontes if he were in prison for the rest of his life?

A. I would be very glad to work with Mr. Belmontes. In fact, if he is sent to Vacaville, on the way there will be people of our group that will meet him there and start using him to talking to the other men in the prison so that other fellas when they get out don't get into the same thing that he has gotten into.

Q. Why would you be using him in that particular way?

A. I feel he has the personality that can work with especially people of his own ethnic background and explain to them – we have had great success with people who are in prison who go and talk to the other young fellas coming in and explain to them what its all about. Explain to them they don't need to get back into this place, that there is something good for them.

Q. Do you have programs in all the prisons in the State of California?

A. Just all of them in Northern California. Well, we have them in all of California, but most of – I take care of mostly just here in Northern California is where I work most of the time. Don't get down south at Chino and those down there.

Q. Following Mr. Belmontes' release from Pine Grove, was he ever involved in such counseling type activities from other wards?

A. After he was released from Pine Grove I took him into Preston a couple of times on a visit to the other wards there and he went into the chapel and told the wards in [2398] there, explained to them what it was like on the outside and was well recepted there by the other men. We already did that through the Exodus House he was in in Oakland. They brought him over.

Q. Is this the sort of activity you see you could use him in the prison system in the future?

A. Yes, Definitely he would be used in the prison system for this sort of activity, which is seemingly at the present time the only solution to a lot of our prison population. You have to get right on the inside to explain to them the alternatives that they really have.

MR. SCHICK: I have nothing further.

THE COURT: Mr. Sueyres.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Miller, if I understand, you were never the M-2 sponsor of Mr. Belmontes?

A. No, I never was.

Q. Okay. You mention that he did return to the institution several times, but this was while he was living at the Exodus House?

A. Yes.

Q. You were aware he was only there for two weeks?

A. That's right. It was twice he went from there. We have a program there every Tuesday and Thursday night at Preston and also on Sunday afternoon, and I'm sure, I remember of him being there at least two times. Would have been more if he had stayed at the Exodus House.

[2399] MR. SUEYRES: Thank you. I have no further questions.

THE COURT: Thank you, Mr. Miller. Thank you for coming. May remain in the courtroom if you'd like.

MR. SCHICK: Fred Haro.

THE COURT: Fred Haro, please.

Mr. Haro, would you come up this way, please. Come right up this way, sir. Come over by the court reporter if you will. Ask you to raise your right hand, the clerk will swear you in.

FRED JESSE HARO,

called on behalf of the Defendant, having been sworn, testified as follows:

THE COURT: Right up here, please, Mr. Haro. State your full name for the record, please.

THE WITNESS: My name is Fred Jesse Haro, H-a-r-o.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mr. Haro, where do you presently reside?

A. Volcano.

Q. In another county?

A. Amador.

Q. Where do you work?

A. I work here in town.

Q. You formerly lived in San Joaquin County?

[2400] A. Yes.

Q. Are you acquainted with Reverend Dale Barrett?

A. Yes, I am. He is my pastor.

Q. You are a member of his church?

A. Yes, I am.

Q. Are you acquainted with this young man seated to my right?

A. Yes, I am.

Q. You know him by name?

A. Yes.

Q. How do you know him?

A. Fernie, yes.

Q. How long have you known Fernie?

A. I've known Fernie for about a year.

Q. When did you first get to know him?

A. Through our church program at church. I became a M-2 sponsor and I became Fernie's sponsor. I've also had about four other sponsors, so Fernie is a long line of sponsors I've had.

Q. You and your wife have sponsored other wards into CYA into your home?

A. Yes, white, Mexicans and blacks.

Q. Can you explain to the jury how this program works for you, the sponsor?

A. It is kind of hard to explain, but I know that – I know that the kids need a lot of love and I know in a place like that they certainly wouldn't get it. And I received Jesus Christ in 1962 and it made a change in my life. And [2401] when it did I really opened up my heart to do a job for kids like him.

Like I said, I've had blacks and whites and Mexicans, so not just an individual group, just people that need love. And so we joined this and we found that we – I think we contribute quite a bit to a lot of boys that we've had. In

fact, all the boys we've had I think we contribute something.

Q. How long was Fernie your sponsor?

A. We had Fernie, oh, about a year, but –

Q. Is that about the same length of time you've had the other boys?

A. I think Fernie is a little longer than we had most of them. Most of them were – we started the sponsorship I think in '79 and we've had, I think, five. Some are just getting out and I lost one or two, and start another session. But Fernie was the one I had the longest, yes.

Q. How many days out of the week would you normally get to relate to the ward?

A. I have – most all – we took special care in our kids that we've had. We took them on Saturdays and Sundays and Wednesday nights. Only time we didn't get them was during fire season we get them once a month, a Saturday and Sunday. So we had Fernie in the home almost two days out of the seven.

Q. What sort of activities did you do?

A. Excuse me?

[2402] Q. What sort of activities did you do with him?

A. Walked around the place and just talked and had fellowship and just like you would do in home with your own boys. He'd kick back and read or eat. I mean, I never babied him. The refrigerator is there, go and eat. Don't put up your hand for the bathroom. You know where the

bathroom is at. I treat them all the same like my own sons. Hey, this place is yours. Treat it like your own. I never had any trouble with any of my boys.

Q. Okay, Did Fernie help out around the house at all?

A. Yeah, but it wasn't required, you know. We didn't take out a M-2 boy to work him. It was just to have him around the house. Let him know people cared for him. We sit down and have chats. If he felt in the mood of talking or I felt in the mood of talking we'd sit on the porch and talk about his life and my life and how things could be better or worse, you know, the circumstances. I had a stepson who was living at the time, too, and I'm quite sure Fernie gave him a lot of help. And at the teenage stage, if anybody has teenagers you know what they are like, they are all in there somewhere and they all need help. And I'm quite sure Fernie, him talking to him done a lot of good to him.

Q. You spent quite a bit of time talking to Fernie?

A. Yes, we spent quite a bit of time talking. We talk about his home, his life, what his plans were, where he was going, what he wanted to do and that kind of counseling along the way. Hey, you know, there is a better way to [2403] live.

Q. Did you feel he responded to that?

A. I think he did an awful lot of responding. He came to church and he made a commitment, you know, and you've got to remember, wards, his own peers are there at church, too, and he made a commitment for Christ, and he also was baptized. And it wasn't easy to be baptized because I've been baptized myself and that is not an easy

thing to go up in front of a whole bunch of people and proclaim that you received Jesus Christ and he has done this.

Q. You've had some other boys in your home you say?

A. I've had some that give me quite a snow job, but I got, well, you know, you still love them, you know, regardless of what, you still love them. And like I said, I had one boy that, like I say, he was there just to get outside and I knew that. And regardless of that we tried to help him, too, and I think we did help him. In fact, he called us back about, oh, about three weeks ago and wanted to know if he could come up. I think he is married. He is married now. That made me feel good that he called.

[2404] MR. SCHICK: Q. Did you have any evaluation of Fernie, whether he was giving you a snow job?

A. No, Fernie never gave me a snow job.

Like I said, I got to treat him like a father and son. He called me dad.

I know myself, being in the situation that I am, it's awful hard for me to call my father-in-law dad when I had my own dad. I've grown to love him so much, I've done that.

I'm sure me and Fernie had just a real good relationship with one another.

Q. Do you remember anything unusual about the very first time you met Fernie in the institution?

A. Oh, he was kind of shy. You know, he wasn't real pushy like some boys. Some boys jump right on the wagon.

They want to let you know that you're all right. He was never pushy.

I had to make the approach. I'm the kind of person that likes to be approached. It was kind of a little battle as to who was going to make the first approach.

Q. Did he tell you anything about himself?

A. Yeah. He talked about himself. I think he told me that – something about him being – how he got there. I guess he wanted to scare me, I guess.

I told him, I said hey, I says, – not scared. Just to let me think that all the kids are in there for something. Maybe I worded that wrong. He wanted to be honest with me, I should say. He wanted to let me know, hey, this is what I'm here for.

[2405] Every boy that I've ever had – most of them have said I'm here for this or that.

I say hey, if you want to talk about it, we'll talk about it. If not, we won't talk about it.

Fernie told me why he was there.

I didn't care why he was there. My intentions were to help him, like I had done the rest.

Q. Have you had any contact with Fernie since he's been released?

A. Since he's been released? Yes, I've had contact with Fernie.

Q. Before he was arrested?

A. Oh, yes, way before he was arrested, yes.

Q. How much contact did you have?

A. We went up to the halfway house with him. We got him moved in, got him situated. Then we met him there.

He didn't seem to be very satisfied there.

I don't know were we – yeah, we must have helped him move in Lodi here. I don't know if we were physically helping, but we met him there. One of the two.

He had an apartment there and he had his baby and he had his girl friend. He was trying to make a good life for himself.

I think at that time he was working for the forestry, up in Pine Grove, that area someplace.

Q. You're aware of the reason why we're here, the fact he's been convicted of a serious crime?

A. Yes.

[2406] Q. You know some of the facts surrounding that crime?

A. Very little of the facts. I do know that he's here for a serious crime.

Q. Okay. You've testified to your knowledge about his personal background and his character as you know it.

A. Yes.

Q. Do you have any personal views on the death penalty?

A. Excuse me. I didn't hear you.

Q. Do you have any personal views on the subject of the death penalty?

A. I'm strongly for the death penalty. That's the way I believe. That's the way I am. That's the way it is.

Q. Do you have any personal opinion about Mr. Belmontes as it relates to the death penalty from what you know of him?

A. I didn't hear you.

Q. Do you have any personal views as to Mr. Belmontes as you know him as it relates to the question of the death penalty?

A. What his views would be?

Q. No. What your views are about him with regard to the death penalty. You know he's on trial here for his life.

A. Right.

I don't think – I believe – I don't know how I should say this. I believe Fernie is innocent. That's the way I feel.

Q. Is that the only reason you have reluctance about his – what happens to him?

[2407] A. No. I have compassion as a son for him. Like I said, I've loved all my – but I just feel that – I don't think Fernie is all that guilty myself. That's the way I feel.

Q. You've had contact with him once or twice since he was released?

A. Yeah, the two times I've told you, once in the halfway house in the Bay Area and here in Stockton here when he was getting a job and working.

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres, you may cross-examine.

CROSS-EXAMINATION

BY MR. SUEYRES: Q. Mr. Haro, you knew Mr. Belmontes in what could be described as a very structured setting, I think. Would you agree?

A. What are you trying to say? I don't –

Q. In other words, when he was with you, he knew that there were certain expectations of him. He didn't have to raise his hand to go to the bathroom, but he had to submit to your authority and your direction.

A. No, not really so, for the simple reason when I brought him in, I treated him as my very own son. I said, "Hey, you have the run of the place." That's what he had. He just had the run of the place. He had no special privileges. Like my own kids, you know. I didn't say you can't do this or that. This is your home. You want to take a nap, lay down and take a nap. You want a drink of [2408] water or milk, you want to go out on the deck, you want to go swimming – well, we didn't have a swimming pool then. But you want to go in the swimming pool, go right ahead.

Q. There were certain expectations that this program – I mean this M-2 program was meant for him to interact with you. Probably the most important part, wouldn't you say, is that you would talk to him to try to gain his confidence and show him something else in life?

A. I see what you're getting at. Yeah. We'd communicate real good back and forth. I mean he'd communicate with me and I would talk to him like a father.

Q. These expectations, if we can call them expectations, or these goals, at least, of the program required that he had to go along with the goals of the program. In other words, if he didn't want to talk to you, if he didn't want to be in the house, if he wanted to leave and walk away and do whatever he wanted to do, why that would be inconsistent and he wouldn't be allowed to stay with you, isn't that right?

A. I don't know what you're trying to say, but –

Q. Let me take a concrete example. While he was in your care he was disciplined and restricted for 90 days at the institution because he left your supervision and the county fair.

A. Who?

Q. Mr. Belmontes.

A. Oh, oh, oh. Well, let me put it this way: At the county fair – I don't know – at the county fair, when we [2409] were just walking around, there were lots of people, and I think he had to go to the bathroom at that time. He was with my stepson. So they went to the bathroom. I mean, you know, is that what you're trying to say? What's the big deal? He had to go to the bathroom. I wasn't the type of person – I don't go to the bathroom with my own son. Why would I go to the bathroom with Fernie?

Q. Mr. Haro, all I'm saying is somewhere in there he did something he wasn't supposed to do and he was

restricted for 90 days because he left your supervision. Isn't that true?

A. Something like that. But that was between him and the camp. I understand what you're saying, he was under my supervision for that and I guess he had to pay the price for it. I didn't think it was that big an issue. I mean, you know. Maybe it was my fault that I should have went to the bathroom with him because I should have known my responsibilities toward him and I was lax.

Q. Counsel has asked you about whether you feel the ultimate penalty is appropriate for Mr. Belmontes, and you've indicated that your personal view is that he shouldn't have that, is that right?

A. Explain that again. You have to speak up louder.

Q. I'm sorry.

Counsel has asked for your personal view as to whether Mr. Belmontes should receive the ultimate penalty in this matter. You told him you didn't think that he should.

A. That's right, I don't think that he should.

[2410] Q. And that is based upon your belief in his innocence?

A. Yes, it is.

MR. SUEYRES: Thank you.

I have no more questions.

THE COURT: Mr. Schick, anything further?

MR. SCHICK: No.

THE COURT: Thank you, Mr. Haro.

You may remain in the courtroom, if you so desire.

MR. SCHICK: Beverly Haro.

THE COURT: Beverly Haro, please.

Mrs. Haro, come right up this way, if you will, please. Come right around over here, if you will, Mrs. Haro. Stop right there and raise your right hand and the clerk will swear you in.

BEVERLY HARO

called as a witness for and on behalf of the defendant, having been sworn, testified as follows:

THE COURT: Right up here, please.

Please state your full name for the record, spelling your last for us.

THE WITNESS: Beverly Haro, H-a-r-o.

THE COURT: Thank you.

DIRECT EXAMINATION

BY MR. SCHICK: Q. Mrs. Haro, you're married to Fred Haro, who was just on the witness stand?

A. Yes, I am.

[2411] Q. Do you know Fernando Belmontes, the young man seated to my right?

A. Yes, I do.

Q. How long have you known him?

A. Oh, I think it goes back to 1979, when we became Fernie's M-2 sponsors through our church.

Q. Were you involved with the M-2 program before you met Fernie?

A. Yes, we were. We've been involved since 1977. We had two other boys before we received Fernie as our ward.

Q. Okay. Do you recall the first time you met Fernie?

A. Yes.

It's a practice that when you're going to sponsor an M-2 boy that you are to go to the camp and meet him on the grounds first and visit with him before you're allowed to take him off the grounds and into your home to see if you feel compatible and whether you both like each other and would like to work together.

My husband and I went to the camp and we were taken into this little conference room, and then Fernie came in, and we sat down and just introduced ourselves and told him that we were going to be his sponsors and just kind of made some small talk.

He just said he wanted to make things clear to us that before we became very involved in him, he wanted us to understand what the charges were that he was there for, that they were serious, and that if we felt that they were too serious or we felt uneasy about bringing him into our [2412] home, that he would understand and not blame us.

So he told us why he was there, and we just said that was fine, it really didn't make that much difference to us, that we were there just because of the Lord and wanted to just really witness to him and hopefully help him in his future.

Q. Did you decide to sponsor him after that meeting?

A. Yes, we did.

Q. Okay. For how long then did you remain sponsors?

A. We sponsored Fernie until he was released. I believe Fernie was released in 1980. We were his sponsors when he was released from the camp.

We also stayed in touch with him after he was released, when he was on the outside.

Q. Okay. Did you have much occasion to talk to or get to know him over the course of that year?

A. I would think so.

We picked Fernie up every Wednesday evening for church, usually around 6:30 in the evening, and brought him back to camp by 9:00; every Saturday at one o'clock in the afternoon until ten o'clock at night; and Sunday mornings from 8:00 in the morning until ten o'clock at night. We did this from probably November of 1979 until he was released in 1980.

During these times we had him usually in our home, but we also would go shopping or whatever our normal family functions were, and Fernie went with us. He was just like part of our family. We never looked at him any differently [2413] and treated him as one of us, as our son.

Q. Did you ever discuss with him his own life?

A. Well, he volunteered a lot to us. I don't know. I can't say what he told my husband. I can only tell you what he confided in me.

Q. Did he talk about his family life?

A. Yes.

Fernie grew to be very close to us and he calls us mom and pop. He's like a son to us and like a brother to our boy Dan.

He's told me that when he's at our house or with us he has never seen this side of life before. He didn't know that people lived like we live. He's always known street fighting.

He said that I probably was closer to him than his mother in his way, that he could talk to me, tell me the things about his childhood, tell me the hurts, the need for love, the caring that he's never seemed to have had, that he felt good in our home, he felt loved for the first time, that he never knew what it was for strangers to open up their arms and just completely take him in with no reservations, no questions asked and give like we gave and the people in our church.

Q. Was he involved in activities at your church?

A. Yes, he was.

He attended Sunday school, he attended the picnics that we had, he attended the services that our pastor held at the camps and any functions, Sunday night services or [2414] movies or anything that was going on, Fernie was

always part of. He went with his group in the Sunday school.

We've never had, you know, a problem.

Q. Were you present when he was baptized?

A. Yes, we were.

Fernie made the decision that he had accepted Jesus Christ and wanted to follow into baptism.

Before you can be baptized at our church, our pastor requires that you go through some classes with him, which Fernie attended.

He was baptized one Sunday afternoon.

He gave a statement before his baptism as to Fred and I taking him into our home as strangers and giving him love that he had never ever seen before and the difference that it had made in his life and the change in the direction that he was going in now as opposed to, I guess, what he had come from.

Q. Now, you have a son?

A. Yes, we have a son Danny, who is 18.

Q. Danny is 18 now?

A. Yes.

Q. At the time that Fernie was in your home were he and Danny about the same age?

A. I think Fernie is probably two years older than Danny. And at the time that we had Fernie, Danny was

going through his typical teenage years of parental rebellion, talking back to mom and things like this, you know, thinking that he needed to go and do his partying.

[2415] Fernie would always talk to him and tell him about Danny not realizing how well he had it at home, that he wished he would have had a family life and a home like Danny had and that Danny was not appreciating it, that he was just taking advantage of us, and would always try and tell Danny, you know, don't talk like that or you don't want to end up getting yourself in trouble and being like me because I'm locked up now and I can't be free like you. And he would always talk to him and try to steer him right and tell him that it sounds good what Danny was thinking that he wanted to do, but that isn't really what Fernie was saying. He says, "You've got everything here and you don't realize it."

[2416] MR. SCHICK: Q. Did you ever meet Barbara Murillo?

A. Yes, on several occasions.

Q. And did you ever have occasion to see Fernie after he was around Barbara?

A. Yes, I saw Barbara and Fernie together at our house. And, of course, I've known Fernie, like I said, since we've had him as a ward. Then I saw Barbara. She came up to visit and immediately there is a change. Barbara is a, in my eyes, a definite negative factor in Fernie's life.

I told Fernie this. It is nothing that he is not aware of. I took him aside that day and – we live out in the country and we have this kind of little private walk that goes through the trees and a big tree stump and this is our place where we go talk, and our son and I go talk there

and Fernie and Danny go talk there. So we went over there that day, and I told him that I have never seen anybody pull somebody down so fast as Barbara did to Fernie. That the peace that he had inside, the ability to believe in himself, to have confidence, was all gone within a matter of just a half day of Barbara being there. His attitude completely changed. He became sullen. He was very moody. He wasn't happy and peaceful any more. And he – I just saw such a definite change in him. I said, if she can do this to you in a half a day, what is she going to do when you are free and you are together all the time?

MR. SCHICK: I have no more questions.

THE COURT: Mr. Sueyres?

[2417] MR. SUEYRES: I have no questions.

THE COURT: Thank you.

Thank you, Mrs. Haro. You may step down.

MR. SCHICK: I have no more witnesses.

THE COURT: Defendant rests?

MR. SCHICK: Yes.

THE COURT: You have a rebuttal witness, Mr. Sueyres?

MR. SUEYRES: Yes, Your Honor. I wasn't able to catch the Court at the recess.

There is a witness enroute from Southern California who is arriving during the lunch hour, and we also have a witness essentially for one question that I can put on at the present time.

THE COURT: All right. Let's do that.

MR. SUEYRES: Sergeant John Donaldson.

THE COURT: Sergeant John Donaldson, please.

Sergeant Donaldson, come right up this way if you will, please. Come over by the court reporter and raise your right hand and the clerk will swear you in, sir.

JOHN T. DONALDSON,

called by the People, having been sworn, testified as follows:

THE COURT: Right up here.

We'd ask you state your full name for the record, sir.

THE WITNESS: John T. Donaldson, D-o-n-a-l-d-s-o-n.

[2418] DIRECT EXAMINATION

BY MR. SUEYRES: Q. Occupation, sir?

A. Detective for Ontario Police Department.

Q. How long have you had that employment?

A. 25 years.

Q. I would like you to think back to February 25th, 1979. Were you employed with the Ontario Police Department on that day?

A. Yes, sir.

Q. Did you have occasion to arrest Fernando Belmontes that day?

A. I did.

Q. Do you recognize him?

A. Yes, sir.

Q. In the course of the arrest, did you have occasion to talk to him?

A. I did.

Q. Specifically, did you ever question him concerning possession of any firearms?

A. Yes, sir.

Q. Would you tell us what was said?

A. I asked him about weapons and at that time he says, "I don't have any."

And his reply, "My only weapon is the Bible."

MR. SUEYRES: Thank you.

I have no further questions.

THE COURT: Mr. Schick?

MR. SCHICK: No questions.

[2419] THE COURT: Thank you, Sergeant. Thank you for coming up.

MR. SUEYRES: Your Honor, we have all the instructions that we can probably spend our time on.

THE COURT: I think we should do that during the lunch hour then I can go on out to the state hospital at that point in time. Then we can reconvene at three o'clock, hopefully. I'll be back, hopefully, at 3:00.

We're going to take our noon recess of approximately three hours, and please come back, ladies and gentlemen, at three o'clock. Hopefully I'll be back. Calendar looks like a little more extensive than I thought about, but I hope to be back by then. So at 3:00, please.

(Recess at 11:54 a.m.)

(Motion in chambers.)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called. We are in chambers with counsel. The defendant is present for our instructions –

MR. SCHICK: Judge, before we do that –

THE COURT: – conference.

MR. SCHICK: Since we are here, I would like to go over a point we talked a little about yesterday off the record. That has to do with the question that has been raised on many occasions regarding the disposition of the codefendant, and whether or not that evidence is going to be presented to the jury.

When we left yesterday, I had mentioned my view that [2420] it was admissible for a couple of reasons, one of which was I felt the command of *Gregg versus Georgia*, that the death penalty is reserved only for those most unusual and – unusual of cases I guess is the best way to

put it in the reasoning of the court, that a comparison for that purpose was appropriate.

It has been pointed out by the district attorney in relying on Freison, F-r-e-i-s-o-n case at 25 Cal 3rd, that some sort of review takes place at the Supreme Court when these cases are being decided, at least that was suggested or hinted at on that case.

I indicated at – last Friday when we had that discussion that I was not aware of that, and on the basis that this was represented as being an actuality, we did not pursue further the question of proportionality review.

I spoke yesterday to two different deputies in the State Public Defender's Office which office is handling the majority of death penalty reviews on appeal. They indicated an awareness of what Freison said and also an awareness of what the case of *People versus Jackson* at 28 Cal 3rd said about that subject and indicated it is not being done. There is no process by which the Supreme Court is reviewing cases on appeal. And in point of fact, indicated in the case of Robert Alton Harris, which this court is familiar with which is now currently before the 9th Circuit Court Of Appeal, on the writ of habeas corpus that the attorney general who represents the People overall has taken the position this should be done at the trial [2421] level.

And furthermore, in the Jackson case when a writ of habeas corpus or in the Harris case when the writ of habeas corpus was filed for the express purpose of ordering discovery and asking for proportionality review the Supreme Court turned it down without a comment.

Therefore, I have a grave concern regardless of what the Court may say on the information I can provide as an officer of the court, that is not happening. There is no way. In other words, if this court, if this jury and ultimately this court imposes a penalty of death upon my client there is not going to be any process by which the proportionality in that sentence in relationship to not only the codefendants in this case but to the defendants, the 31 or so cases in which special circumstances have been filed in San Joaquin County since the death penalty was put back on the books in August 11th of 1977, there is going to be no process by which that review takes place and I am very concerned about that.

I'm also concerned with regard to the specific question of whether or not disposition of Mr. Vasquez comes in. And I was given a case. I was put on notice yesterday that I was being too sneaky and not providing any case law.

First of all, I have a case from the Florida courts and I will cite it to the Court on the record. It is Messer, M-e-s-s-e-r versus the State found in 137 – excuse me, 330, 330 Southern Reporter, second series, page 137 decided by the Florida Supreme Court in March of 1976. In [2422] reading from there at page 141 I'd like to read into the record what the Court said: "We now turn our attention to the question of whether the death penalty statute was properly applied by the trial court during the sentence advisory hearing portion of the trial. It is our conclusion the trial court errored in application of the statute in two particulars. First, all though there is evidence in the record of the plea bargained second degree murder sentence received by appellant's accomplice, Brown, appellant was not permitted during the sentencing portion of the trial to submit

this evidence to the jury. We believe the jury was entitled to know that the codefendant, Ronny Brown, negotiated a plea of guilty to second degree murder and was sentenced to 30 years imprisonment."

I have also discussed, and it was done in a case that is not reported because it is a sentence of life without possibility of parole was imposed, but a Superior Court judge in San Mateo County –

MR. SUEYRES: I will object to any citation that is not authority.

MR. SCHICK: I can put it on the record. You can object after I state it.

THE COURT: He can put it on the record.

MR. SCHICK: Judge Zerne, Z-e-r-n-e Hanning, H-a-n-n-i-n-g in the case of *People versus Nelson*, San Mateo County Superior Court number C-97474 gave an instruction the basic gravamen of which the jury was to consider as another factor in their decision the question [2423] of fairness and the fact that justice should appear to be done fairly on the face of it. And he specifically instructed the jury as to the disposition of the codefendant and the end result was a verdict of life without possibility of parole.

And I think the fact that it can be done as stated in the Florida case and the fact it has been – and I would urge the Court if you wish to try to talk to this judge to see why he did it. It has been done. I'm not just talking, blowing in the wind. There is a reason for putting such evidence in before the jury and I'm renewing my request to do so.

THE COURT: Mr. Sueyres?

MR. SUEYRES: Your Honor, in *Gregg versus Georgia*, U.S. Supreme Court endorsed prosecutorial discretion in the seeking of the death penalty and in plea bargaining. It said there was legitimate reasons why that existed, and that the death penalty was constitutional, even though prosecutor had this discretion to choose to seek it or not.

So in one sense counsel's attack is an attack upon the exercise of prosecutorial discretion, and the U.S. Supreme Court has already found that constitutional.

In another sense, he's asking the Court to consider that in fairness the jury should know of what happened to the codefendants. And so this is the very argument he's making.

If the jury believed Domingo Vasquez guilty of more [2424] than what he was convicted of and, therefore, got some kind of a benefit he did not deserve, the jury should make Fernando Belmontes sentence purportional to and give him a break that he doesn't deserve in the same purportion that Domingo Vasquez got a break.

Now, that is exactly the relevance counsel is suggesting. All right.

So what he's saying to – what he is asking the Court to do is to instruct the jury that even though Belmontes is guilty, even though the aggrevating factors outweigh the mitigating factors so that even though the law requires that they bring in a verdict of death they may exercise their raw power and reviews to bring in that verdict in order to give him a break which he doesn't deserve because his codefendant got a break he didn't deserve.

[2425] MR. SCHICK: I'm not saying the aggravating factors outweigh the mitigating. I think that's a misrepresentation. I'm saying it is a mitigating factor that has to be considered.

MR. SUEYRES: I know counsel doesn't concede the aggravating outweigh the mitigating. He's in effect arguing to the jury even if you believe the aggravating factors outweigh the mitigating, you may refuse to bring in that verdict in order that there be some intra-case proportionality.

THE COURT: Is that what he's saying, or is he not saying in weighing the mitigation versus the aggravation you can take into consideration as a mitigating factor what the disposition of the codefendant might have been?

MR. SUEYRES: Why? Why? That is the question, why?

THE COURT: Because of *Messer versus State of Florida.*

MR. SUEYRES: I heard that quote. That is an error on statutory construction. That's what the quote said. There was an error in applying the statute. As that supreme court interpreted their statute, their court had to allow it in.

Now, who knows what their statute is? Obviously, if it was from 1976, the law that was applied antedated *Furman versus Georgia* and *Gregg versus Georgia* and a generation of death penalty decisions.

[2426] MR. SCHICK: It's the same advisory statute that they have now, which was considered in *Proffitt versus Florida.* It's the same advisory system. This

court, which had the ultimate authority, regardless of what the jury did, said that for the jury not to have received that evidence was error. That's the question that they ruled upon.

THE COURT: It's an issue that has troubled me from the very beginning.

MR. SUEYRES: To take it one step further, counsel has cited a case out of a superior court in San Mateo County. That is not authority. We don't have a written decision. Even if we did, it is not authority and it may not be cited to the Court, any more than I can suggest to you that some court in Cucamonga, California, decided that that was inappropriate.

THE COURT: No, I will not take that into consideration in making the decision.

(Pause)

MR. SUEYRES: I have two arguments, really, for the Court.

One is the theoretical argument that such a factor is not provided for in statute or in any case law. As a matter of fact, the case law is contrary.

THE COURT: I couldn't agree with you more, Mr. Sueyres. There's nothing in the statute that provides for it.

MR. SUEYRES: Now we come to the practical aspect, Judge.

[2427] The Court has indicated it will not allow the People to relitigate a conviction involving a plea bargain.

Counsel now asks to relitigate the conviction of Domingo Vasquez. Besides seeming to be inconsistent and unfair, let me explain to the Court what such a relitigation will entail.

This superior court struck the special circumstances. The jury would be entitled to know that. Not this department, but this superior court.

They will also be entitled to know that I consulted with the Attorney General's Office in consideration of an appeal of that decision.

And they would be entitled to know what information I received and what case law I relied upon in deciding that an appeal would be unsuccessful.

They would then know that the most that Domingo Vasquez could be convicted of, by judicial action, was first degree murder.

Then we come to the problems with why he was allowed to plead guilty to second degree murder. I'll have to go through every factual and legal consideration that impinged upon that decision and explain the differences in the evidence available against Mr. Vasquez as the evidence against Mr. Vasquez that came in this trial.

Let me give the Court one small example. I made no attempt to object to the hearsay statements concerning the hearsay of Steacy McConnell when she spoke to her parents and said that Domingo Vasquez had threatened her. That was [2428] clearly hearsay, it was used for an improper purpose, and upon my timely objection this Court would have been bound to exclude it. I didn't object because I was going to let the defendant take his best shot at Domingo Vasquez. You know, it may seem inappropriate

that a prosecutor should be that altruistic, but that is in fact why I allowed it in.

But in the trial of Domingo Vasquez, I am certain that Mr. Vasquez' attorney would object based upon hearsay.

I was prepared to argue a legal theory. Judge Kim had not ruled finally. But I knew that the theory I was arguing was frightening to me because if I won, it could be a ground of reversal, and ultimately I was thinking that even if I won, I might choose not to put it in.

So evidence came in – the point is evidence came in against Vasquez at this trial which would not be available at Vasquez' trial, and the jury would have to know that.

They would also have to know that it concerned my belief in the veracity – my personal firm belief in the veracity of Robert Bolanos based upon my interview of him and Deputy Holman's interview of him and my belief that he was telling the truth about who committed the murder. Although he never said who did it, he always said he wasn't in there, but he described repeatedly and in detail the thumping noises he heard and the statements that Mr. Belmontes made about taking out a witness.

So I knew who did it, and I knew that if Vasquez pled guilty to second degree murder it carried a life top, and I knew that there would be no injustice in that because it's [2429] only the felony murder rule that makes him responsible for murder anyway, and because of the felony murder – well, as counsel pointed out, it's being challenged. Because I knew that I couldn't corroborate Bobby Bolanos because Vasquez never did make a statement until after his conviction regarding this offense, because Lucy Flores would not be allowed to testify because of

People versus Shirley, because Vasquez wasn't the perpetrator of this murder and because I knew that Fernando Belmontes had killed before, I chose to proceed against Mr. Belmontes.

Now, at the time Shirley was decided, there was a plea bargain offer and it rested on that sole one basis, *People versus Shirely*.

MR. SCHICK: To whom?

MR. SUEYRES: To you.

MR. SCHICK: For the record. To Mr. Belmontes.

MR. SUEYRES: To Mr. Belmontes.

After the first Shirley decision and before their modification.

Of life without parole, a plea. He refused it.

Proposition 8 came along. I wasn't in any position to offer it again. And, besides, Shirley had changed.

I mean if the Court chooses to open up this area, we're going to have to be allowed to show that the evidence they've heard against Vasquez was not the evidence that a jury would hear against him. And they would have to know that it involved some very sincere and legitimate concerns [2430] on my part to allow this plea.

And they would also have to be told that the United States Supreme Court and the California Supreme Court have endorsed judicial – I mean presecutorial discretion for these very reasons.

So I mean what are we going to do? Are we going to litigate that case for days?

MR. SCHICK: I'd like to be heard on that.

THE COURT: All right.

MR. SCHICK: I find it interesting that the primarily reason for making this decision is, number one, he feels that it might give my client, as he put it, a break to which he is not entitled. In other words, in the prosecutor's view, Mr. Belmontes may be allowed by this jury to receive a verdict of life as opposed to death. And yet the only thread upon which such an important and extremely vital distinction hangs is the fact that we might spend some more time on this case when we've already spent six weeks on it. I cannot conceive of that justification for making this distinction.

If we take that time factor away, we're left with this: Mr. Sueyres says he firmly believed Robert Bolanos, and I'm sure he does. If he believes Robert Bolanos, then Robert Bolanos was going to be a dominating witness against Domingo Vasquez. Lucy Flores' testimony added very little. But if you want to look at this case, which he has impliedly done, and analyzed the Domingo Vasquez circumstances, Robert Bolanos was a sufficient witness to [2431] convict Domingo Vasquez of first degree murder. And that's very clear, taking Mr. Sueyres' argument that was provided to this jury. They're going to be able to see, well, you told us on this occasion that Mr. Belmontes was guilty and the other people were guilty of first degree murder, yet he chose not to do so in regard to the prosecution of Domingo Vasquez. It's that very question that I don't think can be answered that causes problems.

I do not think the courts have upheld the broad sweep of prosecutorial discretion. Why is there the hint of

proportionality review? As I've indicated, it hasn't actually taken place, but why is it permitted?

I have another case here on a little different point from an Alabama court where the offer that he talked about that he made in this case is a factor that I think should be presented to the jury and, if not, is certainly going to have to be considered by this Court if we get to the point where the Court has the power and the decision-making authority under Section 1181.7 to decide whether a death verdict stands or not.

THE COURT: All right. The Court does find that the conviction and plea, negotiated plea of Domingo Vasquez, is not relevant to the inquiries with reference to penalty of Mr. Fernando Belmontes, and the Court will not allow that irrelevant material to be presented.

There is nothing in the statute to allow that evidence to be presented to the jury.

MR. SCHICK: What about the question of the [2432] plea bargain that has been conceded by the prosecutor as having been offered?

THE COURT: That shall not be presented to the jury, either.

MR. SCHICK: Could I just give the name of the case for the record?

THE COURT: Certainly.

MR. SCHICK: 369 Southern Reporter 2d Series. Cook, C-o-o-k, versus the State. And the relevant language comes about on page 1258 of that decision.

THE COURT: Thank you.

Shall we take up the issue of instructions, gentlemen?

MR. SUEYRES: I've supplied counsel and the Court with a complete set.

THE COURT: The Court shall give CALJIC 1.01, Instructions To Be Considered As A Whole.

The Court shall give 1.02, Statements Of Counsel, Evidence Stricken Out, Insinuations Of Questions, Stipulated Facts.

The Court shall give 1.10, Masculine Form Of Pronoun Includes All Persons.

CALJIC 2.00, Direct And Circumstantial Evidence, Inferences.

The Court shall give CALJIC 2.11, Production Of All Available Evidence Not Required.

The Court shall give CALJIC 2.20, Credibility Of Witness, 1980 Revision.

The Court shall give CALJIC 2.21, Witness Wilfully [2433] False, Discrepancies In Testimony.

The Court shall give CALJIC 2.22, Weighing Conflicting Testimony.

The Court shall give CALJIC 2.27, Sufficiency Of Testimony Of One Witness.

People's Instruction Number 2, pursuant to *People versus McClellan*, did you want to discuss that, Mr. Schick, or do you have any objections?

MR. SCHICK: I don't have any objections to this. I have some other things later on down the road.

THE COURT: The Court shall give People's Instruction Number 2.

CALJIC 2.90, the Court shall give, Presumption Of Innocence, Reasonable Doubt, Burden Of Proof.

The Court shall give CALJIC 3.30, Concurrence Of Act And General Criminal Intent?

MR. SUEYRES: We attempted to show a battery upon Barbara Murillo, an assault upon John Dustin and so forth.

THE COURT: Thank you.

The Court shall give CALJIC 3.34, How Intent Is Shown.

The Court shall give CALJIC 8.84, Penalty Trial, Introduction.

MR. SUEYRES: Judge, may I suggest that, while they don't follow in chronological order, that the instructions defining the various prior criminal activities be given prior to the ones speaking of the penalty phase because we're talking about two different standards of [2434] proof there.

THE COURT: I'm sorry. You want me to give –

MR. SUEYRES: It's just a matter of order, Judge.

THE COURT: Um-hmm (affirmative).

MR. SUEYRES: People's Special Number 3, CALJIC 9.00, and CALJIC 16.140, 141, 142.

THE COURT: You want me to give those before –

MR. SUEYRES: Before 8.84.

THE COURT: Yes.

MR. SCHICK: What are we changing now?

THE COURT: You want me to give CALJIC 9.00, People' Instruction Number 3, CALJIC 161.40, CALJIC 161.41, CALJIC 16.142 shall follow CALJIC 3.34?

MR. SUEYRES: Right.

Perhaps the Court should take a look at People's Special Number 3 for a moment, Judge. That involves a particular type of assault. I think the law is clear, but I don't want the Court to notice it for the first time later on.

[2435] THE COURT: I don't have any problems with People's Instruction Number 3. I think that is just a fairly –

MR. SCHICK: I don't see anything.

THE COURT: – a clear statement of the law.

So that takes us to CALJIC 8.84, Penalty Trial Introduction.

CALJIC – excuse me, People's Instruction Number 1 for CALJIC 1.00.

MR. SCHICK: We discussed that a little bit yesterday, Judge, and I read back over that, I believe it is H-o-s-l-e case that was cited by Mr. Sueyres, and it appears that the conducts which was being measured by the

Court in terms of what the prosecutor did was he said, put yourself in the shoes of a surviving victim in the case.

And as I understood the primary reason for this instruction to be introduced and the reason the district attorney wished it to corrolate with his argument was that he may in fact perhaps plans to make reference to the victim in this particular case who is deceased.

And I think there is a difference in degree there because that is another factor that's considered in a little different way in the facts and the instructions of the law. Hosle talked about a victim who was alive and not one who had been deceased.

THE COURT: I do think that the way in which the instruction is couched is a proper manner in which to present it to the jury in the sense that they are not to be [2436] swayed by public opinion or public feeling or prejudice or sentiment only when it comes into the prudent factors in mitagation and/or aggravation. And I think they can do that and it places them in a situation or a frame of mind where they can take into consideration that which was presented on behalf of Mr. Belmontes.

MR. SUEYRES: That is exactly my point, Your Honor, is that if we don't give that instruction the jury may think back to the original instruction that says don't consider sympathy, and obviously the bulk of Mr. Belmontes' mitagation case is sympathy.

THE COURT: That's right. So they can take that into consideration in the mitagation factor.

CALJIC 8.84.1, Penalty Trial Factors For Consideration, shall be given.

MR. SCHICK: With regard to that particular instruction, I think it is important that the Court make a determination as to which, if any of those factors bear upon the evidence that's been presented here. I don't think we should just read them off seriatim.

I think we should determine which ones apply, because the problem you get into otherwise the jury may look at what could be potentially mitigating circumstances saying, gee, they are not present so that makes it an aggrevated case. I think we should limit it to whatever theories each party applies to the facts elicited.

THE COURT: Subparagraph A applies, circumstances of the crime.

[2437] There is no question that subparagraph B applies, attempted force.

MR. SCHICK: Could I make one comment on subparagraph A?

THE COURT: Yes.

MR. SCHICK: Again referring to an out of state case, but it bears somewhat, the case of *State versus Cherry*, which is 257 Southern Reporter, second series, beginning at page 551 with the relevant language found at page 568.

North Carolina Supreme Court gave the opinion there that the introduction of the special circumstance again during the course of the penalty trial when it has been – when conviction for first degree murder has been based upon the felony murder rule was error in their opinion and it amounted to, in a sense, double punishment. And I would like to cite that case to the Court and ask the Court

to, read it if you are so inclined before ruling upon whether the evidence of the special circumstances should be reintroduced as the statute says under part A.

THE COURT: Well, I think the statute as far as paragraph A is concerned is quite clear. It indicates that the jury must take into consideration or – must take into consideration the circumstances of the crime of which the defendant was convicted in the present proceedings and the existence of any special circumstances found to be true. And I shall read subparagraph A as stated.

Subparagraph B, subparagraph C shall be stated.

[2438] I don't know about subparagraph D. It would appear that is not appropriate.

MR. SCHICK: Well, my only consideration, Judge, is that part of the testimony of the witnesses today is that the circumstances when Mr. Belmontes was not in a structured situation, was around his girl friend, led to pressures that he was not able to deal with very adequately. For that reason I ask it be given.

MR. SUEYRES: If he wants it, Judge, give it. If he doesn't want it I don't have any quarrel with that either.

THE COURT: All right. There was some testimony in the guilt phase also of Mr. Belmontes' emotional condition.

Subparagraph E., that doesn't apply. That shall come out.

Subparagraph A –

MR. SCHICK: F.

THE COURT: I mean F, excuse me. That does not apply.

Subparagraph G we'll give.

Subparagraph H we'll give.

Subparagraph –

MR. SCHICK: Well, there has been no evidence in that regard, Judge. I would ask number H not be given.

MR. SUEYRES: Whatever counsel wants to do.

THE COURT: All right. Will come out.

[2439] Subparagraph I shall be given.

I think subparagraph J should be modified.

MR. SCHICK: What did you have in mind?

THE COURT: Well –

MR. SUEYRES: Judge, why don't we hear what the defendant wants to do first? I mean, that really has to control.

THE COURT: All right. In light of the special findings that they made, I question commission of the offense was relatively minor. But if you want me to give it, I'll give it.

MR. SUEYRES: I think the way to approach this, Judge, is not to muck with it unless the defendant wants us to.

MR. SCHICK: Well, the relatively minor I don't think applies. I think if we were to put it whether or not

the defendant was an accomplice to the offense, period, and let it go at that. Otherwise I would ask it not be given.

MR. SUEYRES: You can't stop it in the middle. One clause modifies the other and –

MR. SCHICK: You asked me what I wanted and I told you.

MR. SUEYRES: Okay.

THE COURT: Court will not give it.

MR. SCHICK: Will not give it?

THE COURT: Will not give it.

MR. SCHICK: K, I ask it be given.

[2440] THE COURT: It will be given.

CALJIC 8.84.2, as modified pursuant to *People versus Ramos*, shall be given.

CALJIC 17.30, Jury Not To Take Cue From The Judge, shall be given.

CALJIC 17.31, All Instructions Not Necessarily Applicable, shall be given.

CALJIC 17.40, Individual Opinion Required Duty To Deliberate, shall be given.

CALJIC 17.41, How Jurors Should Approach Their Task, shall be given.

MR. SCHICK: I did ask one thing, Judge, I realize 17.40 has been tendered, but with regard to 8.84.2 as modified, I would ask that in the second to the last

paragraph after the word agree, if you can should be added as well.

THE COURT: We'll add it.

Anything further, gentlemen?

(Pause)

MR. SCHICK: Yeah, I have some proposed instructions.

THE COURT: Did you wish some time, Mr. Sueyres, to go over Mr. Schick's proposed instructions?

MR. SUEYRES: Obviously I'm going to have some comment on them, but I think he's got citations that are longer than the instructions, at least one instance, and I really – I can see that I ought to pull a few cases and read them.

[2441] THE COURT: It would appear after the Court has perused the instructions that they would be applicable. But I will allow you some time if you wish.

MR. SCHICK: Only other question I have, Judge, is with regard to the actual verdict forms. I have some requests – perhaps we can take them up when we come back.

THE COURT: That is fine.

MR. SCHICK: What I'm thinking of so Mr. Sueyres is aware, I'm going to be proposing that the Court ask the jury to make specific findings as to what the aggrevating circumstances they find specifically to be true and denominate them and they do the same thing with regard to the mitigating circumstances.

I'm also going to ask that every juror sign for the particular mitigating or aggrevating circumstances they find to be true. And the reason for my asking this, if there is ever going to be a proportionality review this information is going to be relevant.

The Court did allow special verdicts over the guilt trial over my objection because of the fact Mr. Sueyres felt it might be helpful on review, and that is my rationale here.

So I am proposing we give some specific thought as to what aggrevating circumstances he wishes to argue to the jury. And I have made a list of proposed mitigating circumstances that I would like the Court to consider in submitting the decision.

[2442] MR. SUEYRES: And have every juror sign the verdict form?

MR. SCHICK: Yes. If they are going to make a decision as serious as the one he's asking them to do, everybody should have the guts to sign the verdict form.

THE COURT: That certainly might be a unique approach.

MR. SUEYRES: When do you want us back?

THE COURT: Try 2:30. The state hospital calendar is horrendous today. I've only got six cases – seven cases, however, they look like they are very involved. They have not been involved up to today, but let's try 2:30 and –

MR. SUEYRES: I mean, obviously I'm going to have some rather long comments about some of the instructions.

THE COURT: All right. Thank you.

MR. SUEYRES: By the way, there is one more thing and as long as we have the reporter here it is appropriate.

I did not object during counsel's opening statement, but I feel that there was a very flagrant violation in his opening statement and assignment of misconduct in telling the jury that upon – they could – suggesting to them that because of his personal acquaintance with Mr. Belmontes for 16 months that – that they shouldn't give him the death penalty. And I didn't object at that time, but I just would like the Court to be aware that I plan to object if [2443] any such statement is made during closing argument.

MR. SCHICK: My purpose in bringing it up was I knew several background factors that were going to come out that hadn't come out.

THE COURT: I would order you, however, not to refer to your –

MR. SCHICK: I won't do it, but that was the purpose for it to be introduced.

THE COURT: About your personal relationship with Mr. Belmontes, I think that goes without saying that is not proper argument. All right. Thank you.

(Recess at 12:38 p.m.)

[2444] AFTERNOON SESSION

(At 3:12 p.m. the following proceedings were had in chambers:)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called in chambers with counsel.

We have gone over the proposed jury instructions on behalf of the defendant.

The Court has read and considered Instruction Number One, and Instruction Number One shall be given as modified.

Any objections, gentlemen?

MR. SUEYRES: No.

MR. SCHICK: No.

THE COURT: With reference to Defendant's Proposed Instruction Number Two, that shall be allowed and shall be given by the Court.

With reference to Instruction Number Three, that instruction shall be given as modified.

With reference to Instructions Four and Five, Mr. Schick, I have indicated to you that the Court shall not give that instruction – those instructions.

For the record, did you wish to state your objections to that?

MR. SCHICK: Yes, Judge. My reason for suggesting Instructions Four and Five is that the current penalty law we have does not really give the jury any real

guidance as is contemplated by the *Gregg versus Georgia* [2445] case. For that reason I'm attempting to ask the Court to put the traditional standards. I suggested beyond a reasonable doubt. I would suggest possibly clear and convincing and preponderance in the absence of those. As a means of giving the jury some way to weigh the aggravating circumstances and whether or not they exist in Instruction Four, and the question of how to weigh between the two in Instruction Five.

That's my reason for giving them.

THE COURT: Thank you.

Mr. Sueyres.

MR. SUEYRES: Yes, Your Honor. Under *People versus Jackson* in 28 Cal. 3d and *People versus Frierson* in 25 Cal. 3d, Four and Five would be error.

THE COURT: The Court has determined that that is not the state of the law at the present time in the State of California, and the Court has refused to give Instructions Four and Five.

MR. SUEYRES: With respect to the defendant's special findings, I'm a little concerned that they tend to focus upon particular factors in a particular fashion.

THE COURT: I don't think there's any question of that. As well as they seem to be a little over-laden with the factors in mitigation rather than in aggravation.

MR. SUEYRES: There's none here that relates to circumstances concerning the crime. I can't conceal the [2446] fact that I think that is the determinative factor in this case. That's my personal view.

MR. SCHICK: I am the proponent and certainly I did so with the idea in mind that certain factors were emphasized by my evidence and by the evidence that was produced at this penalty trial. I understand Mr. Sueyres' position that he would want to add the extra factor about the circumstances of the crime and whatever. And we had a discussion about my objections to that earlier today.

I have proposed these as some factors that I feel exist with the idea that we might be able to discuss and come up with them. Because I feel some guidance – my concern is that there's going to be no way, if there is a verdict of death, no way in which the jury decision can be evaluated, and the guidance that the courts hopefully need in making that decision is going to be absent. We're going to be stuck with people who do not have to say anything more after their decision has been made, and there is going to be no way of evaluating it.

THE COURT: I think it would be very helpful for us to have some findings by the jury. But I don't – I just don't see how we can possibly make a determination as to which of the findings should be presented to them. They are numerous, both in mitigation, as well as in aggravation, and to try to couch it in A through Z would be a very difficult procedure. Because of that – and I don't think it should be limited to that. Perhaps in the future that [2447] will need to be done, but at this stage I don't think we should do it as proposed.

The Court will not allow that.

MR. SCHICK: Could I make those part of the record, Judge?

THE COURT: You certainly can.

MR. SUEYRES: Has counsel had the opportunity to view the proposed verdict forms I submitted to the Court?

MR. SCHICK: No.

THE COURT: I have them here.

The proposed jury instructions by the defendant, those that have been refused, as well as the proposed jury instructions with reference to the findings concerning aggravating factors and mitigating factors, shall be made part of the record as if set out in full.

MR. SCHICK: I have no quarrel with the verdict forms, except, as I previously indicated, Judge, I do feel that the verdict should be signed by each individual juror.

THE COURT: That request is denied.

MR. SUEYRES: Judge, if I can have –

THE COURT: Five minutes?

MR. SUEYRES: Yes.

(Whereupon the following proceedings were had in open court, in the presence of the jury, at 3:26 p.m.:)

[2448] THE COURT: The record will reflect the jury is all present and accounted for, the defendant is present, we are now ready to proceed with rebuttal testimony.

Mr. Sueyres.

MR. SUEYRES: Yes. We'd call Mona Terrell.

THE COURT: Mona Terrell, please.

Mrs. Terrell, would you come right up this way, please. Come right up through the swinging gate, if you will. Come right over here by the court reporter. We ask that you raise your right hand, and the clerk will swear you in.

MONA TERRELL,

called as a witness for and on behalf of the People, having been sworn, testified as follows:

THE COURT: Right up here, if you will, please.

We'd ask that you state your full name for the record, spelling your last.

THE WITNESS: Mona Terrell, T-e-r-r-e-l-l.

DIRECT EXAMINATION

BY MR. SUEYRES: Q. Your occupation?

A. Probation officer, San Bernardino County.

Q. Were you so employed in March of 1979?

A. Yes, sir.

Q. Did you have occasion to talk to a Fernando Belmontes in that month?

A. Yes, I did.

[2449] Q. And the purpose – excuse me.

The purpose of your interview related to court proceedings?

A. Yes, sir.

Q. All right. Did you have occasion to speak to Mr. Belmontes on the subject of religion, or did that come up?

A. It came up during the interview.

Q. All right. What did he tell you about that?

A. He said that a couple of months ago a friend had turned him on to Christ and that he had been attending the Soldiers of Christ Church a couple of times a week and that he was working there, also, sometimes during the day. And that – I think one of the quotes was that his only weapon is a Bible.

MR. SUEYRES: Thank you.

I have no further questions.

MR. SCHICK: No questions.

THE COURT: Mr. Schick? No questions? That was a long ride.

THE WITNESS: It was.

THE COURT: Thank you very much for coming. I appreciate it very much.

Anything further, Mr. Sueyres?

MR. SUEYRES: We rest.

MR. SCHICK: No surrebuttal.

[2450] THE COURT: Ladies and gentlemen, you have heard all of the testimony you are going to hear with reference to the penalty phase of this particular proceeding.

What we are going to do is now we are going to allow counsel to argue the matter before you just as we did in the penalty phase.

Once again, I admonish you what they have to say is not to be considered by you as the evidence presented to you. You are the triers of fact in this matter. You have to decide what the evidence has shown.

We are going to have somewhat of an unusual proceeding in that the Court is going to allow Mr. Belmontes also to argue his case. I have granted Mr. Schick's motion to appoint Mr. Belmontes as his co-counsel, and he is going to offer an argument to you on his behalf. What Mr. Belmontes has to say to you is not to be considered by you as evidence, only what he thinks the evidence did show.

Once we conclude the statements of counsel and Mr. Belmontes, I'm going to instruct you on the law. We will then recess until tomorrow morning at 9:30, depending upon where we go. I don't think I want to send you out for deliberations this evening. And I will ask you return to this courtroom at 9:30 in the morning. Take the roll if everybody is here and send you out for your deliberations tomorrow so you won't have to come back on Friday.

Mr. Sueyres has indicated he will stipulate to the fact he will not have to be here when you are sent out for [2451] deliberations due to his wife eminent birth giving process. So Mr. Sueyres, you may proceed.

MR. SUEYRES: Thank you, Your Honor.

Ladies and gentlemen of the jury, let me caution you as I have each time I've spoken to you that what I say is neither evidence nor law. It is intended to help you. If it doesn't help you you are to reject it.

But we've approached the stage of the case that none of us really wanted to come to. The task before you is really awesome. Mine's done. I'd ask you to listen carefully as you have throughout the trial, and I'd like to thank you, to that and to the instructions that the Judge gives you. Again, I'd like to talk about those for just a moment to tune you up to what you will hear and so you can avoid confusion, hopefully.

After I talk about the instructions, I want to say just a brief word about the task you face. And then I'd like to talk about the factors which you will be weighing one against the other in making your decision.

I would like to point out that at this stage of the proceedings there is no burden of proof with respect to which side has to prove aggrevating or mitigating circumstances, though there is a burden of proof with respect to prior criminal activity and I'll discuss that later. Where there is no burden of proof that means that the People, this side of the lawsuit, are not given an extra argument. That means I have one opportunity to address you. This is it. And then the defendant and his [2452] attorney will have a word for you.

With respect to the instructions, you're going to be given many of the same instructions that you had before. There are really only a couple of changes. The first is that in this listing of aggrevating and mitigating circumstances which you are to weigh one against the other, there is a proper place for sympathy and passion.

In other words, at the guilt phase you were told the Judge gives us the law but you are the judges of the facts. At this stage of the proceedings you are not only the judges of the facts, you decide how much they weigh. And

in weighing them, it is proper and it is necessary to take into account factors that impinge upon anger and sympathy and so forth.

Let me tell you what that doesn't mean, if I may. Your regard for Steacy McConnell's family, mean no one, no one can deny sympathy for them, no one. But that is not the kind of sympathy the instruction tells you to consider. It says as sympathy or passion naturally arises or properly arises from the factors in aggravation and mitagation. Okay.

And again, sympathy for the defendant's family. He has a mother. We all have a mother. We can't help but feel that pang of human emotion for her. We would be less than human if we did or if we didn't. But the point is, that isn't one of the factors in aggravation. That's – I just wanted to caution you on that instruction. But it is different than the guilt phase when sympathy was to play no [2453] part at all.

The other concerns the burden of proof. Let's be very careful. You will get an instruction concerning burden of proof beyond a reasonable doubt here. And it relates to a certain of the factors in aggravation. I keep talking about these factors, and I'll tell you what they are later. But for this purpose, there is one of them that involves prior criminal activity. For example, I'll list them for you.

There was the assault on the other ward at juvenile hall. There was the battery of Barbara Murillo. There was the, what we call conditional assault, and I'll explain that to you later on, Rudy, when his gun was taken. And there was the implied threat to use deadly force that Mr. Steve Cartwright talked about when the defendant said he was carrying his protection with him. And the courts – and the

rule is that you can't use any of that against the defendant unless it is proved beyond a reasonable doubt.

In other words, in affect, that testimony accuses him of other crimes and it wouldn't be fair to hold that against him unless it was proved beyond a reasonable doubt, okay? And we talked so much about it before I'm not going any further in talking about it. But I will say this: With respect to each of those incidents, for whatever they are worth, and that is for you to decide, I don't think there is any question that they were done and they were done as they said. No one, no evidence contradicted Steve Cartwright. As a matter of fact, the defendant, as I [2454] recall, said it had occurred, this conversation with Steve Cartwright had occurred.

And nobody, nobody has testified contrary to Barbara Murillo.

Nobody has testified contrary to William Cartwright when he describe the incident with Rudy.

There is nothing contrary to Mr. Ron Cutlar's testimony. So all those incidents are proved beyond a reasonable doubt.

It is a matter of, what does it add up to? How much does it weigh? I mean, if your job is to weigh one against the other what they weigh and – is a little different question and we'll get to that in a moment.

Finally on this issue of instructions. The burden of proof at the penalty phase and the burden of proof for these prior criminal acts is beyond a reasonable doubt. For your purpose here, there is no burden of proof. It is not up to one side or the other to prove he ought to die or that he ought to live. It is a simple weighing which and there is no

other word for it really, which way do the scales of justice tip? That is what it is all about.

Now, the factors for consideration will be read to you, and I'd like to mention them briefly now and then talk about them a bit. Excuse me, there is one thing I wanted to mention and that is the task you had at hand. That was the second part in this.

I've told you that you have to – that what it is is weighing it back and forth. Let me tell you what your job [2455] isn't. Your job is not to talk about whether the death penalty is proper, whether it is legal, whether in another society or another world we would have it another way. Your duty is to follow the law as the Judge gives it to you and I know you will do that. All right.

Now, I'd like to talk about those factors. The Court will tell you that you may take into account, and he'll read them in their entirety but let me just run through them quickly, the circumstances of the crime for which the defendant has been convicted.

Now, let us be careful. The fact of his conviction which you found is not a factor. In other words, that would make it automatic that somebody got the death penalty. If you just said he's been convicted of first degree murder, therefore, automatically he gets the death penalty. No. No. But the circumstances of how he did it and what exactly he did, yes, that is a very proper subject of consideration, and I believe the most important one for you, but I will talk about that later.

B or the next one, the presence or absence of criminal activity involving force or violence. That is those four incidents I was talking about where the witnesses talked

about the weapons and the battery and assault. That's another factor to weigh.

The next one is the presence of a prior felony conviction. There has been a prior felony conviction for concealing evidence of a felony with the intent that should not be discovered. Okay.

[2456] The next one is whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance. And I think the key here is extreme mental or emotional disturbance. So, for example, had he, in his beating of Barbara Murillo, killed her and come to this point in the proceedings, assuming it was possible, all though let me tell you it is not, have it come to that point, you know, his emotional upset at her, any of us that have been married and any of us that have a brother or a sister, any of us who have anyone close to them know that somebody close to you knows where those buttons are in you that make you react and knows how to get to them whether they mean to or not. And that emotional disturbance is a consideration that should be given a man in deciding, weighing back and forth whether – what penalty he should receive. I'd like to come back to that one in just a moment because there are several that we will consider together.

[2457] MR. SUEYRES: The next one, whether or not the defendant acted under extreme duress or under the substantial domination of another person.

Extreme duress means essentially that somebody was forced to do something. You see, in the law, the law is that if a man puts a gun to your head and says rob a store and you do it, you're not guilty; you were forced to do it. If he puts a gun to your head and says kill someone else and

you do it, the law says no, that does not excuse your conduct because taking another human life is too serious. There's no legal excuse there. So we have this instruction that says if you have duress that doesn't amount to a legal duress, at least it can be considered by the jury at this proceeding.

Of course, under the substantial domination of another person, I'm sure you can imagine what kind of a situation in which that might arise. Somebody telling a younger brother or a wife go do this.

The next factor is the age of the defendant at the time of the crime.

And finally a catchall, really a catchall, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime.

Okay. What I'd like to do is to talk about these factors. By the way, these factors are either aggravation or mitigation as you find them to be. So, for example, the defendant may well say I was only 19 when this happened or the attorney may say he was only 19 and when you're young [2458] sometimes you make mistakes, mistakes that you would never make if you were 29 or 39. And that sort of thing must be taken into account. When you are young, your judgment isn't right or isn't mature or developed.

On the other hand, however, it's common experience that when you're young people are idealistic, altruistic, they believe that anything is possible, that people love one another or that everything is good or all is good for them and that as they age, a cynicism creeps in. Maybe that's too strong a word. A hardening, maybe. And that it doesn't

always necessarily mean that you're a better person when you get older.

Going the other way around, it doesn't mean you're a better person when you're younger, either.

All I'm saying is that I think the age of the defendant goes both ways, really.

All right. With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that the defendant's religious experience is within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.

I'm not sure it really fits in there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration.

Let's talk about it for a moment. You know, first of all, it's no secret that the evidence upon which the defendant's religious experience rests is somewhat shaky. Not that the people who talked about it weren't sincere. I [2459] don't mean that for a moment. But that we have come to know Mr. Belmontes in another way, a way that he never showed those other people, a way that, for example, Mr. Haro can't even conceive that he would act. Can't conceive of it. And yet we know, we know with certainty that he's not the person or not always the person that Mr. Haro knew in his home.

So when Mr. – or Reverend Barrett or – I think Mr. Miller was a little more acute in his evaluation of Mr. Belmontes. When they say he had a genuine and sincere religious experience, I think we have to take it with a grain of salt. He had one in 1979, at the time he was arrested or going through the court system. He had one

when he was in the youth authority, again with some very obvious nonreligious benefits attached. He obviously has one – has other benefits by this experience now. So I think we have to take it with a grain of salt.

In any event, that's not to say that people can't be of two minds, that, you know, stones have different facets. You can see one side of them and see one and look to the other side and it's different. But it's all one stone.

All right. In any event, is a religious awakening a basis for determining penalty? That's really the issue, how much does that weigh, or does it weigh on one side or the other.

All right. I suppose you can say it would be appropriate because – in this fashion: The defendant may be of value to the community later. You recall the people [2460] talking about how he would have the opportunity to work with other prisoners in prison. And I think that value to the community is something that you have to weigh in. There's something to that.

On the other hand, the fact that someone has religion as opposed to someone doesn't should be no grounds for either giving or withholding life. I mean let's turn it around and look at the other side of the coin. Suppose someone said he didn't belong to a church and didn't talk to a minister. Would that man deserve to die merely because of that? So if he says he has religion, does he deserve the other penalty, life? I don't think that that should be an influencing factor at all in that respect. I don't think the law contemplates that and I don't think it's right.

And I think, you know, it goes without saying that while this country is made up of religious people and was founded by men of religious persuasion, the task you have before you is completely secular or to be determined without reference to religious beliefs.

And I don't mean to imply, either, that you can't individually seek the guidance of your maker in making your decision. I think that's entirely appropriate, too.

I think the defendant may suggest to you that – or it may occur to you that because he is a very intelligent person – and he is. With almost a philosophical turn to him, something that is not particularly common in court. I don't think that that is a factor to be weighed either way [2461] because it goes both ways. We could infer that he knows better than most what he was doing. On the other hand, it doesn't mean he's particularly valuable. It's the way that intelligence is put to work, I think, that matters.

[2462] MR. SUEYRES: Or that he is particularly likeable is a fact, because, I know his family is attached to him. We all heard that. I don't think that that matters one way or the other. Some people tend to be more quiet or more morose or something. You can't decide something like this based on personality. That is not right.

I think you will hear that you should consider life based upon some lingering doubt concerning his guilt. You've heard all witnesses who just find it impossible to believe that he would be guilty or guilty exactly as he was guilty, you know. And I suppose if you had a lingering doubt that would be a factor to weigh. Certainly it might be.

But I think after hearing the evidence, especially as time has passed, you know, the conviction grows stronger as each minute passes, and there is no lingering doubt on this.

He can't suggest to you he feels remorse, because ladies and gentlemen of the jury, that is the one thing that we have never heard, that he is sorry. As a matter of fact, the only emotion, the only genuine emotion that I saw, and I think you saw, came during his cross-examination on the guilt phase when he expressed anger at Domingo Vasquez for standing and staring in shock instead of picking up the stereo. So there is no remorse. No thought of Steacy.

I think you'll be told that Barbara Murillo and the defendant's mother were bad influences, and that that extenuates the gravity of the crime or induces an emotional [2463] disturbance or distress. This is the one I said I was going to come back to. Somehow between the two I think we can justify considering that his girl friend was a bad influence. And somehow, somehow, his mother must have failed. But he's old enough that he has to take responsibility for his own actions, and he told you that. He can't use that as a crutch. I give him that credit for recognizing that.

Can we really say that – that our choice of penalty and what justice demands is substantially changed by the fact that he was living with Barbara up until three weeks before the offense or that he didn't have a father in the home? That he had picked bad companions? My recollection of the evidence is that it appeared that he was the leader of the band rather than vice versa.

Going on, what about the other side of the coin? I mentioned age and I mentioned some other things. The

fact of his prior criminal activity. Look, let's be straight forward. The prior criminal activity has been described to you on the stand isn't great, you know. People get into fights with their wives, not all of us and not to that extent, but, I mean, it is nothing so serious that it outweighs the others. Or the fact that he took a gun and committed what we call a conditional assault. That is, he said – let me talk about assault for a minute. Assault is a swing and a miss. A battery is a swing and a connection.

A conditional assault is where you hold up your fist and you say, get out of here or I will hit you. And if you [2464] have no legal right to tell somebody to get out of here you have committed assault in threatening to use that force and having the present ability to apply it.

So with respect to the gun, Rudy's gun, you know, taking the gun and sliding the bolt and pointing the revolver implies, you let me keep it, something I'm not legally entitled to do, or I use it on you. So that is a conditional assault.

All right. So these things, they really, they don't show that the defendant is such a horrible person that the ultimate penalty must be imposed. But what they do show is that other side of the stone. Somebody once described it to me this way: You take a large rock, it is like a river washed rock and it is smooth and you crack it open. One side is smooth and the other side is rough, and yet it is the same rock. What we have done is showed you the other side of Fernando Belmontes.

And the way I add it up is all the things I've talked about so far wash out. Well, come up a draw. There is nothing really pointing one way or the other in the case to this point.

Then we come to the circumstances of the crime, okay. I had forgotten to mention the prior conviction of accessory after the fact of voluntary manslaughter. Put that in there, too, still a wash. Come to the circumstances of the crime. Excuse me just a minute.

(Pause)

I'm going to ask you have a little patience with me [2465] for a moment. I'd like to read you something that was written by an 18th Century poet, and minister, just a couple of sentences in connection with the circumstances of the crime.

No man is an island unto himself. Every man is a piece of the continent, a part of the main. If a clod be washed away by the sea, Europe is the less. As well as if a promontory were, as well as if a manner of thy friends or thy own were. Any man's death diminishes me because I am involved in mankind.

Somehow that captures the precise problem that you have, is that you can put yourself in that man's place and imagine and sympathize with what he's going through. But that is exactly why we are here in this way, is that he could not put himself in Steacy McConnell's shoes. Now, you need not decide the whys and the wherefores in order to reach a verdict, but I tell you, that is where it is.

In our system of law it is a central theme that punishment must be proportionate to the crime, the crime and the factors concerning the offender here that we've already talked about.

One scholar put it this way: Punishment is the way in which society expresses its denunciation of wrongdoing.

And in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them.

Another man put it this way: The purpose of law is [2466] not merely to control behavior. Even a tyrant can control behavior. But it is also to promote respect for that which should be respected. For example, human life.

A dreadful crime requires a dreadful penalty, not in the sense that that penalty must be awful. Not in the sense of painful, but in the old sense of commanding profound respect and reverential fear.

Ladies and gentlemen of the jury, I've told you that as we assess these factors they're a wash until you get to the point when you consider the circumstances of the crime itself. And when you look to that circumstance, to that cold and calculated decision to take out a witness for personal convenience – and he could have turned and walked away. When after struggling with her he decided to hit her. When after hitting her once he hit her again. We have a situation in which he could not put himself in Steacy McConnell's shoes. He thought only of himself.

[2467] MR. SUEYRES: I believe that it is entirely appropriate that after you stand in Mr. Belmontes' shoes you stand in Steacy's and you say to yourself if law is a moral statement, if punishment is to engender respect for law and proper behavior, what is the appropriate penalty for what happened to that young girl? How do we tell the world that nothing excuses what he did? How do we tell the world how awful that crime was? We tell the world, we answer justice really, not individuals, but

justice, and our oath, by an awful penalty, one commanding reverence, fear and profound respect.

As I indicated to you, this is my only opportunity to speak to you.

I haven't gone through all the testimony and what the various witnesses said. You listened too carefully for me to see the need to do that. I'm sure during the course of your deliberations, if not during the argument of counsel, various and particular points the witnesses mentioned will come up. I ask you to think carefully about the point that is raised by yourself or others and the countervailing points.

You're not to line up on one side of the other, of course.

I wish to thank you very, very much for your attention.

I wish to thank you very, very much for the considered deliberation that you will go through and your verdict, however it is.

THE COURT: Thank you, Mr. Sueyres.

[2468] Mr. Belmontes.

THE DEFENDANT: I ain't much on speaking, but I'd like to tell you a little bit about how I feel about all this, about the things that Mr. Sueyres has said about me, about what he thinks about me.

He sat and told you – or stood and told you about how to judge other people on what they believe I've done or said I have done. Mr. Sueyres himself, he's only giving you his point or what he thinks that I'm guilty of doing or my position in this whole crime.

You've heard my parents – or my mother, my grandfather talk about my childhood, that it wasn't a very good childhood.

I can't use that as a crutch to how I am right now. A lot of people have had rough childhoods and come out a lot better than I have. I realize myself that once I got old enough to know right from wrong, then it was my decision on how I wanted my life to be. So, you know, I can't really say it's on my childhood or how I was brought up or things I didn't have or things I did have. A lot of people are like that.

You've heard people up here talk, Reverend Barrett, my M-2 sponsors, Mr. Miller, talk about my involvement in church with them, how they know me.

It's true that while I was with Bev and Fred that I did see a different life, a life that I've never seen before, and I wanted to be like that, I wanted to change my life and see how it was. I tried. Like I said, it's a lot [2469] easier to do while you're in jail because you have a lot less pressures.

When I did get out, when I did go to a Christian home and I wanted to stay and become a Christian and keep my life the way I felt it was, I guess I couldn't deal with the pressures out there. Like I say, it's a lot different.

I'm not coming here and saying right now that I'm a full-fledged Christian or a born-again. I was born again and I still feel the same way, but I'm not using that as a crutch, also. But it is something that I tried and I really believe in.

As for the verdict right here that you're going to deliberate on right now, I myself would like to keep my life and not really lose it in the gas chamber.

Mr. Sueyres has stated that he does not feel that I have remorse. Mr. Sueyres does not know. He hasn't been sitting in the county jail for 17 months. Mr. Sueyres was not there that day.

Mr. Sueyres has told you that I'm the actual killer. He does not know. He wasn't there. He's only going on what he thinks happened that day.

I have thought a lot about it.

He says I can't put my feet in her shoes. It's true, I can't. I didn't go through it. I wasn't the one who was actually killed. But he hasn't had to sit and think about actually getting put in the gas chamber or life without imprisonment (sic). I'm not saying I didn't do it or wasn't guilty. Like I said, I was involved to a certain [2470] extent. I have to pay for what's happening – for what happened, and I can deal with that. You know, there's only two choices right now, life without the possibility or the death penalty. Both of them ain't really – isn't really any good. There's always the possibility that while you are living with life without the possibility that you will die in there. You can't really say. Things happen.

But there is an opportunity to achieve goals and try to better yourself. Mr. Sueyres has indicated that he feels that I'm a little bit shaky in my walk with the Lord. He doesn't know this, he doesn't know what I've been through, he hasn't been in my shoes.

He stated that my mom has failed. My mom never failed. She did the best she could under the circumstances. We can't blame her. I can't blame her.

I can't blame Barbara. We've had our problems. I don't deny hitting her or getting in an argument with her.

But everybody goes through problems in their lives. I'm not just the only one who has done this or been involved in something like this.

I don't have hard feelings towards you, the jurors, for the verdict you brought back, I don't have no hard feelings toward the officers who investigated the crime, toward Mr. Sueyres or toward the family. They obviously want me to go to the gas chamber. I don't have hard feelings towards them. They have done their job and you have done your job, also. It's just something that has to be done. But I myself would really like to have my life [2471] and try to improve myself.

Mr. Sueyres has said that I stood up there and hit Steacy once and then hit her again. I didn't think about myself. Again, he wasn't there. He doesn't know that I actually hit her the 20 times like he says I was. This is his belief.

I'm not no professional lawyer or nothing like that, but I'd like you to also think about how he is. He's going by what these people think about me, how they know me. He doesn't know me. He's never been past being the D.A. in the case.

He's indicated to you that I'm supposed to be a potentially violent person. He doesn't know that. Things come up in everybody's life to where they have to be involved in some things one way or another.

I just ask that you think about this a lot and give it a lot of thought as to the verdict on this penalty phase.

That's it.

Thank you.

THE COURT: Thank you, Mr. Belmontes.

Mr. Schick.

[2472] MR. SCHICK: Ladies and gentlemen of the jury, we're here to decide a question of life and death, because the law does permit it. The things Mr. Sueyres talked to you about the law, the aggrevating factors, the mitigating factors are an attempt by the law to give you some guidance as you go in and deal with this very enormous and very difficult question you are going to have to consider.

We've taken a moral question, a subjective question, and tried to give it objective dimensions. And I don't mean to try and give you fancy language, but we are trying to say, can you take all factors, A, B, C and D, can you put them on one side and say they aggrevate the circumstances or put them on one side and say they mitigate the situation and come up with a decision based upon that. And that is not easy to do, and it is not going to be easy for you to do.

Mr. Sueyres has told you that in his view the primary and the overriding consideration in terms of his analysis of the case is the way in which the homicide occurred. And there is no getting around the fact that what happened in that homicide was not pleasant. There is nothing that can be done to change that. Those factors have already been presented to you in great detail. I'd just like you to remember at the time you weigh that, if that becomes – as you've been asked to, that becomes the sole and primary determinate upon whether you decide Mr. Belmontes spends the rest of his natural life in prison or whether he goes [2473] to the gas chamber, to consider the argument you were given at the time of the guilt trial and the

evidence that was produced, it was never suggested that the reason for going there was to kill this young girl. It wasn't to take away her life.

The evidence, as theorized by the district attorney in his final argument to you, is that something went wrong inside and a quick remedy had to be taken and things progressively and steadly got out of control.

I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means, and I'm not going to insult you by telling you I think it excuses in any way what happened here. That is not the reason I asked these people to come in.

I don't think I could put it any better than Reverend Barrett did in his testimony on the stand to you folks. He said, I've known this man for over a year and I have some insight in him you folks don't have. You've only been here to hear specs and dots along the line that makes up Fernando Belmontes' life. You've only been allowed to see certain aspects of that life, and undoubtedly a very prominent aspect of what happened on March 15th, 1981. But you can't possibly know and you can't possibly make a decision about a question as important as the one we face unless you know something about the man. And that is the total purpose of the witnesses who came in.

I don't suggest to you that the absence – the presence of religion in itself is a totally mitigating [2474] factor either, but what does it tell us? We talked to all of you at great detail and great depth when we voir dired you and I know many of you have very personal, strong and religious beliefs and they are part of your valued system. And that is a very, very vital function religion plays in anybody's life and why it is an extremely important part of our society is

that it does help to create and to promote values, the values that human beings find by which to live their lives.

And while Mr. Belmontes has told you he is not going to use a crutch for what happened in the first part of his life, I'd like to suggest to you until he got to know Beverly and Fred Haro, until he saw a kind of the life that most of you and I have had the opportunity to live growing up, he didn't really know, he didn't really have the sense of values that a human being, a young man about to embark upon adulthood should have. And that is what his experience with Reverend Barrett and Beverly and Fred Haro in that time he was there in their home while he was in the California Youth Authority meant.

And talking about their beliefs and their feelings about what happened afterwards, and again trying to lay the blame at Barbara Murillo, as I admit I hinted at in the testimony, does not excuse the activity either. But it has to give you an idea as to what happened, because ladies and gentlemen, if you don't have any idea whatsoever as to how something like this can come down, as to how the facts you've heard unraveled in front of you can happen between [2475] two human beings, two of the most valuable entities we have can occur and end up the way the facts did in this case, you're not going to be able to make that determination.

And what I am suggesting to you and what I hope the evidence suggests to you is Fernando Belmontes cannot make it on the outside. I think it is pretty clear from the experience that he had inside, the kind of development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own.

You remember Mr. Miller, how he testified to the difficulty people even have in ordering a meal because they are so used to having things done for them. Again we are not saying this is an excuse, but you have to understand the problems that people have in dealing with their lives. The problems that Mr. Belmontes had as people slowly drifted away. Barbara Murillo was gone. He was there on that weekend with people he really didn't know very well, Mr. Bolanos and Mr. Vasquez. He was falling down.

Remember Beverly Haro when she testified when she saw bash Fernando Belmontes with Barbara Murillo, he was up here and she was down here. One would hope the process would elevate her, but that is not what she observed, he gone down to her level and that is exactly what happened with these other people.

We are not talking about pinning medals on anybody or putting people at large. We are down to a very narrow set of choices, and given those choices I think it is proper to consider punishment. I firmly believe in the concept of [2476] punishment, and I think anybody who is apparent cannot get by without that belief, without that ability to handle the guidance of your own children as they grow up and need to be contributing members of our society. But let's assess punishment. Let's assess what it means in this case.

Punishment is one of two choices. Consider, if you will, a young man who is 21 years old, Mr. Belmontes. I'm not an actuary, but let's assume he has 50 to 55 years left of his life. Fifty to 55 years from now I dare say many of us won't be here, but a sentence of life without possibility of parole means that for every day, 24 hours a day, seven

days a week, 365 days a year he will be without that most precious commodity that we have, freedom. You will punish him far greater and for a far more significant impact upon his life by sending him to prison for the rest of his life.

You've probably heard about people in a position of being on death row asking for execution. You all remember the Gary Gillmore charade a few years ago, prisoner in Utah who wanted to be killed. There are some people who feel that way because they can't deal with it. It is easier to die than to face that possibility. It is easier to die than to face the possibility of never, ever having your freedom and totally being at the command of other people. Doing what you are told.

If you want to impose, and I think you need to impose a punishment. This young man needs to be punished. I'm not going to tell you that isn't a truth. But if you want [2477] to impose a punishment upon him that has meaning, that has teeth in it, send him to prison for the rest of his life, however long that may be. Because when you analyze it, when you stop and think about that other option, about the option of death, why do we decide to kill people as a society? We justify it in war. Certainly nobody has quarrels with that. Sometimes there are people who are conscientious objectors and they have feelings about that and those are legitimate feelings. But aside from that nobody opposes that concept of killing other people.

But how do we feel? How do we justify it? How do we justify taking another of God's creatures by killing them? We dehumanize the other people. Look at the Vietnamese war. We weren't fighting Vietnamese. We were fighting Gooks. Look at the Japanese war, we called them Wops

and Japs. World War 1 we fought the Huns. We made it possible in our mind to dehumanize these people so we could go out and kill them and not feel guilty about it.

That is exactly what we must do and what you are being asked to do in evaluating the life of Fernando Belmontes. You are being asked to look at him and say to yourself, this man is not a human being. He has committed such an atrocious act he is without any redeeming characteristics. He has nothing within him that I can look him in the eye and say, that is a fellow human being, a creature of God as much as you or I. You must be able to do that, to go through that process of dehumanizing him in order to kill him. And ladies and gentlemen, that is exactly what the [2478] evidence I produced at this penalty trial has shown.

[2479] MR. SCHICK: This young man stands convicted by your decision, a decision he has indicated he lives with, a decision I live with as his attorney. But, ladies and gentlemen, he has not been proven to be dehuman.

The people who came in here told you about him. They told you not only what they know of him, but they gave you, as best they could, under the very difficult circumstances of somebody looking at the rest of their life in prison, a game plan, something he can do with his life, something he's been able to do. We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, to contribute something in whatever way he can. I'm only trying to suggest something because it's difficult for any of us to conceive of such a harsh penalty as life in prison without ever being released.

And it is harsh. You remember during voir dire you were asked to compare these two penalties. I think it was constantly referred to as life without possibility as being the more lenient of the two penalties. Well, to the extent that Mr. Sueyres believes Mr. Belmontes should die, I suppose it is lenient.

But I ask you to consider this: Aren't you really imposing a severe, a harsh and a deserved punishment by sending him to life without the possibility of parole?

Thank you very much.

THE COURT: Thank you, Mr. Schick. Ladies and gentlemen, I think – because of the [2480] emotional aspects of this case, I don't think I'll instruct you tonight. I'm going to ask you to come back in the morning at 9:30. In the event that I am not through with my 8:45 calendar at 9:30, I will recess that 8:45 calendar and instruct you at 9:30 promptly.

If, as you have noticed in the last couple of days when you've been here, I'm still going, just come into the courtroom, and as soon as the bell tolls 9:30, I will recess, you'll take your places, and then I will instruct you in the law.

Mr. Sueyres will not be with us tomorrow morning.

I will need a stipulation from Mr. Sueyres to allow me to read the instructions with someone from your office present.

MR. SUEYRES: Yes, Your Honor, that's fine.

THE COURT: Very well.

Tomorrow morning at 9:30.

Thank you.

(4:30 p.m.)

Case No. 32183 No. 22 810

COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT

– – – o0o – – –

Appeal from the Superior Court of San Joaquin County
HON. WILLIAM R. GIFFEN, Judge

– – – o0o – – –

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent, vs. FERNANDO BELMONTES, Appellant.	VOLUME IX (Pages 2,481-2,565)

REPORTERS' TRANSCRIPT ON APPEAL

APPEARANCES OF COUNSEL:

For the Respondent: GEORGE DEUKMEJIAN,
Attorney General,
State of California, Suite 350,
555 Capitol Mall,
Sacramento, California

For the Appellant: In Propria Personna

[2481] SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	
Plaintiff,	)	No. 32183
vs.	)	Dept. No. 7
FERNANDO BELMONTES,	)	
Defendant.	)	

The above-entitled matter came on regularly for hearing on Thursday, August 5, 1982, at the hour of 9:34 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098 and JOHN SQUIRES, C.S.R. No. 2001

[2482] APPEARANCES OF COUNSEL:

LEE SHATTUCK and GERARD WALL, Deputy District Attorneys, Courthouse, Stockton, California, appeared as counsel for and on behalf of the People.

JOHN SCHICK, Attorney at Law, 2027 Grand Canal Boulevard, Stockton, California, appeared as counsel for and on behalf of the Defendant.

– – – o0o – – –

[2483] (Whereupon the following proceedings were had:)

THE COURT: People of the State of California versus Fernando Belmontes is called for further jury trial.

The record should reflect jury is all present. Defendant is present. All parties are present and we are ready to proceed.

Ladies and gentlemen, I will now read to you the instructions that apply to this part of the proceedings. Some of the instructions which I will read to you you have already heard in our previous proceedings but they still apply to the evidence that was presented to you in this proceeding.

I'm required to read these instructions to you here in open court. You may have them with you during your deliberations once again. Those instructions that have been modified or there have been some deletions you are not to surmise as to what those deletions are nor are you to try and figure them out or try to read where I've scratched out some words.

As jurors you have two duties to perform. One duty is to determine the facts from the evidence received and not from any other source. The word fact means something that is proved directly or circumstantially by the evidence or by agreement of counsel. Your other duty is to apply the rules of law I state to you to the facts as you determine them and in this way to arrive at your verdict.

[2484] It is my duty in these instructions to explain to you the rules of law that apply to this case. You must accept and follow the rules of law as I state them to you.

If any rule, direction or idea in these instructions is repeated or stated in varying ways, no emphasize is intended and you must not draw any inference because of

its repetition. You are not to single out any certain sentence or any individual point or instruction and ignore the others. You are to consider all the instructions as a whole and are to regard each in the light of all the others.

The order in which they are given has no significance as to their relative importance.

Statements made by the attorneys during the trial are not evidence; however, if counsel for the parties have stipulated to any fact, you will regard that fact as being conclusively proved as to the party or parties making the stipulation.

A stipulation is an agreement between attorneys as to matters relating to the trial.

As to any question to which an objection was sustained, you must not guess as to what the answer might have been or as to the reason for the objection.

You must never assume to be true any insinuation suggested by a question asked a witness. A question is not evidence and may be considered only as it supplies meaning to the answer.

[2485] You must not consider for any purpose any offer of evidence that was rejected, or any evidence that was stricken out by the Court; such matter is to be treated as though you had never heard it.

For sake of convenience, the masculine pronoun is used in these instructions and applies equally to all persons.

Evidence consists of testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or nonexistence of a fact.

Evidence is either direct or circumstantial.

Direct evidence is evidence which directly proves a fact, without the necessity of an inference, and which by itself, if found to be true, establishes that fact.

Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.

It is not necessary that facts be proved by direct evidence. They may be proved also by circumstantial evidence or by a combination of direct evidence and circumstantial evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

[2486] Neither side is required to call as witnesses all persons who may have been present at any of the events disclosed by the evidence or who may appear to have some knowledge of these events, or to produce all objects or documents mentioned or suggested by the evidence.

Every person who testifies under oath is a witness. You are the sole judges of the believability of a witness and the weight to be given the testimony of each witness.

In determining the believability of a witness you may consider anything that has a tendency in reason to prove

or disprove the truthfulness of the testimony of a witness, including but not limited to any of the following:

The extent of the opportunity or ability of the witness to see or hear or otherwise become aware of any matter about which the witness has testified;

The ability of the witness to remember or to communicate any matter about which the witness has testified;

The character and quality of that testimony;

The demeanor and manner of the witness while testifying;

The existence or nonexistence of a bias, interest, or other motive;

Evidence of the existence or nonexistence of any fact testified to by the witness;

The attitude of the witness toward the action in which testimony has been given by the witness or toward the [2487] giving of testimony;

A statement previously made by the witness that is consistant or inconsistent with the testimony of the witness;

An admission by the witness of untruthfulness;

The witness' prior conviction of a felony.

A witness willfully false in one material part of his testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you shall believe the probability of truth favors his testimony in other particulars.

However, descrepancies in a witness' testimony or between his testimony and that of others, if there were any, do not necessarily mean the witness should be discredited. Failure of recollection is a common experience; and innocent misrecollection is not uncommon. It is a fact, also, that two persons witnessing an incident or transaction often will see or hear it differently. Whether a descrepency pertains to a fact of importance or only to a trivial detail should be considered in weighing its significance.

Once again, you are not bound to decide in conformity with the testimony of a number of witnesses, which does not produce conviction in your mind, as against the testimony of a lesser number or other evidence, which appeals to your [2488] mind with more convincing force. This does not mean you are at liberty to disregard the testimony of the greater number of witnesses merely from caprice or prejudice, or from a desire to favor one side as against the other. It does mean that you are not to decide an issue by the simple process of counting the number of witnesses who have testified on the opposing sides. It means that the final test is not in the relative number of the witnesses, but in the relative convincing force of the evidence.

Testimony which you believe given by one witness is sufficient for the proof of any fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.

You are instructed that in this case the People have attempted to prove as factors in aggravation, prior criminal activity which involved the use or attempted use of or

the express or implied threat to use force or violence. You are instructed that you may not consider any of these incidents in deciding penalty unless such criminal act is proven beyond a reasonable doubt.

Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some [2489] possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction, to a moral certainty, of the truth of the charge.

In the incident charged as battery and assault, there must exist a union or joint operation of act or conduct and general criminal intent. To constitute general criminal intent it is not necessary there should exist an intent to violate the law. When a person intentionally does that which the law declares to be a crime, he is acting with general criminal intent, even though he may not know that his act or conduct is unlawful.

The intent with which an act is done is shown as follows:

By a statement of his intent made by a defendant.

By the circumstances attending the act, the manner in which it is done, the means used, and the soundness of mind and discretion of the person committing the act.

For the purpose of the issues on trial here today, you must assume that the defendant was of sound mind at the time of his alleged conduct which, it is charged, constituted the acts described in the information.

There is testimony that the defendant was guilty of an [2490] assault, a violation of Section 240 of the Penal Code. The crime of assault is an unlawful attempt coupled with the present ability, and the general criminal intent, to apply physical force upon the person of another.

In order to prove the commission of the crime of assault, each of the following elements must be proved:

1. That an attempt was made to apply physical force upon the person of another,

2. That such attempt was unlawful, and

3. That at the time of such attempt the person who made the attempt had the present ability to apply such physical force, and

4. That the person making the attempt had general criminal intent, which, in this case, means that he intended to commit an act, that the direct natural and probable consequences of which if successfully completed would be the application of physical force upon the person of another.

To constitute an assault, it is not necessary that any actual injury be inflicted. However, if an injury is inflicted it may be considered in connection with other evidence in determining whether assault was committed and, if so, the nature of the assault.

An assault, as defined in the foregoing instructions, may also be committed even though the defendant does not try to apply physical force but merely threatens it [2491] conditionally and immediately.

To constitute such an assault, where the application of force is withheld upon condition, the following circumstances must appear:

1. The condition must be present, not future and the compliance demanded be immediate;

2. The defendant must have no right to impose such a condition;

3. The defendant must have present ability to enforce his condition.

[2492] THE COURT: The definition of battery, pursuant to Penal Code Section 242, is as follows:

Every person who wilfully and unlawfully uses any force or violence upon the person of another is guilty of battery, a misdemeanor.

As used in that foregoing instruction, the words "force" and "violence' are synonymous and mean any wrongful application of physical force against the person of another, even though it causes no pain or bodily harm or leaves no mark and even though only the feelings of such person are injured by the act. The slightest unlawful touching, if done in an insolent, rude or angry manner, is sufficient.

It is not necessary that the touching be done in actual anger or with actual malice; it is sufficient if it was unwarranted and unjustifiable.

The touching essential to a battery may be a touching of the person, of the person's wearing apparel, or of something attached to or closely connected with the person.

No provocative act which does not amount to a threat or attempt to inflict physical injury, and no words, no matter how offensive or exasperating, are sufficient to justify a battery.

The defendant in this case has been found guilty of murder of the first degree. The charge that the murder was committed under special circumstances has been specially [2493] found to be true.

It is the law of this state that the penalty for a defendant found guilty of murder of the first degree shall be death or confinement in the state prison for life without possibility of parole in any case in which the special circumstances charged have been specially found to be true.

Under the law of this state, you must now determine which of said penalties shall be imposed on the defendant.

You are instructed as jurors you must not be swayed by mere sentiment, conjecture, prejudice, public opinion or public feeling. Also, you must not be influenced by sympathy or passion except as those feelings properly arise out of your consideration of the proven factors in aggravation and mitigation. Both the People and the defendant have a right to expect that you will conscientiously consider and weigh the evidence and apply the law of the case, that you will reach a just verdict regardless of what the consequences of such verdict may be.

In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall

consider, take into account and be guided by the following factors, if applicable:

(a), The circumstances of the crime of which the [2494] defendant was convicted in the present proceeding and the existence of any special circumstance found to be true.

(b), The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c), The presence or absence of any prior felony conviction.

(d), Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e), Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(f), The age of the defendant at the time of the crime.

(g), Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

You are instructed that for purposes of your deliberations and verdict you are to consider life without possibility of parole to mean imprisonment until death without release.

After having heard all of the evidence and after [2495] having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all twelve jurors must agree, if you can.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it to this courtroom.

In deciding whether the defendant, Mr. Belmontes, should be sentenced to death or to life imprisonment without the possibility of parole, you must weigh the mitigating circumstances against the aggravating circumstances that you find to be established by the evidence. The fact that you have found Mr. Belmontes guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating circumstance.

[2496] I have previously read to you the list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account

of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the fact on any question submitted to you or that I believe or disbelieve any witness.

If anything I have done or said has seemed to so indicate, you will disregard it and form your own opinion.

You have been instructed as to all the rules of law that may be necessary for you to reach a verdict. Whether [2497] some of the instructions will apply will depend upon your determination of the facts. You will disregard any instruction which applies to a state of facts which you determine does not exist. You must not conclude from the fact that an instruction has been given that the Court is expressing any opinion as to the facts.

Both the People and the defendant are entitled to the individual opinion of each juror.

It is the duty of each of you to consider the evidence for the purpose of arriving at a verdict if you can do so. Each of you must decide the case for yourself, but should

do so only after a discussion of the evidence and instructions with the other jurors.

You should not hesitate to change an opinion if you are convinced it is erroneous. However, you should not be influenced to decide any question in a particular way because a majority of the jurors, or any of them, favor such a decision.

The attitude and conduct of jurors at the beginning of their deliberations are matters of considerable importance. It is rarely productive of good for a juror at the outset to make an emphatic expression of his opinion on the case or to state how he intends to vote. When one does that at the beginning, his sense of pride may be aroused and he may hesitate to change his position even if shown that it is wrong. Remember, you are not partisans or advocates in [2498] this matter, but judges.

We will swear the bailiffs in to take charge of the juror.

(Whereupon the bailiffs were sworn to take charge of the jury.)

THE CLERK: Thank you.

THE COURT: We'll give the verdict forms to the bailiff, along with the instructions.

THE BAILIFF: We'll have to leave the jury here while we take Mr. Belmontes out.

THE COURT: Fine.

(Pause)

Ladies and gentlemen, if you will go with the bailiff.

The alternate jurors should probably go with the bailiff as well and stay in the hallway upstairs, if you will.

Thank you.

(Whereupon at 9:56 a.m. the jury retired to commence deliberations and court recessed.)

[2499] (Whereupon court reconvened at 1:35 p.m. and the following proceedings were had:)

THE COURT: Mr. Norton, I understand the jury has a question that was presented to me before the lunch hour, and I asked the bailiff to take you to lunch and on your return I would only read you the instruction that applies to your question. And under the law, that is what I have to do. I could not answer your question without asking you to come back – without asking the panel to come back, and I have to read you the instruction as stated. It is under the concluding instruction, CALJIC 8.84.2 as modified.

The last paragraph. You think it is necessary to read the entire instruction, Mr. Schick? Mr. Wall?

MR. WALL: Well, since Mr. Sueyres wife has had a baby today, I'm here just to fill in.

THE COURT: I'm going to read the entire instruction.

It is now your duty to determine which of the two penalties, death or confinement in the state prison for life without possibility of parole, shall be imposed on the defendant.

You are instructed that for purposes of your deliberations and verdict you are to consider life without possibility of parole to mean imprisonment until death without release.

After having – after having heard all of the evidence and after having heard and considered the arguments of [2500] counsel, you shall consider, take into account and be guided by the applicable factors of aggrevating and mitigating circumstances upon which you have been instructed.

If you conclude that the aggrevating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggrevating circumstances, you shall impose a sentence of confinement in the state prison for life without the possibility of parole.

And the next paragraph is the germane paragraph.

You shall now retire and select one of your number to act as foreman, who will preside over your deliberations. In order to make a determination as to the penalty, all 12 jurors must agree.

Any verdict that you reach must be dated and signed by your foreman on a form that will be provided and then you shall return with it into this courtroom.

MR. SCHICK: Excuse me, Judge. I think the one I have on there is what you did read at the time, if you can.

THE COURT: That is an instruction that was provided by defense counsel and I shall read that to you as well.

MR. SCHICK: In 8.84.2 it was just included and I didn't write it down.

THE COURT: It is on mine. I wrote it in on [2501] mine. That is true. Thank you, Mr. Schick.

That sentence was modified by the Court, and in order to make a determination as to the penalty, all 12 jurors must agree, if you can.

JUROR HAILSTONE: If we can't, Judge, what happens?

THE COURT: I can't tell you that.

JUROR WILSON: That is what we wanted to know.

THE COURT: Okay. I know what will happen, but I can't tell you what will happen.

MR. SCHICK: Maybe we should inquire whether the jury could reach a verdict.

THE COURT: Do you think, Mr. Norton, you will be able to make a decision in this matter?

JUROR HAILSTONE: Not the way it is going.

JUROR NORTON: That is tough, yes.

THE COURT: Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?

JUROR NORTON: I believe there is a possibility.

JUROR HUCKABAY: We did need more time.

THE COURT: I think so. I think you need more time.

Yes, Mrs. Hern?

JUROR HERN: The statement about the aggrevation and mitagation of the circumstances, now, that [2502] was the listing?

THE COURT: That was the listing, yes, ma'am.

JUROR HERN: Of those certain factors we were to decide one or the other and then balance the sheet?

THE COURT: That is right. It is a balancing process.

Mr. Meyer?

JUROR MEYER: A specific question, would this be an either/or situation, not a one, if you cannot the other?

THE COURT: No. It is not that.

JUROR MEYER: It is an either/or situation?

THE COURT: Exactly. If you can make that either/or decision. If you cannot, then I will discharge you.

JUROR HAILSTONE: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?

THE COURT: That is something you cannot consider in making your decision. All right?

We'll ask you return them to the jury room.

THE BAILIFF: I please ask you to wait until –

(Recess at 1:40 p.m.)

[2503] (Whereupon court reconvened at 5:12 p.m. and the following proceedings were had:)

THE COURT: Record should reflect the jury is all present and accounted for.

Defendant is present and all parties are present.

Ladies and gentlemen, it has been a long day for you and I think you best go home and get some rest.

What we will need, gentlemen, is a stipulation from the parties allowing the jury to return to the jury room at 9:00 a.m. tomorrow morning without having to come back to court.

MR. WALL: So stipulated, Your Honor.

MR. SCHICK: So stipulated.

THE COURT: If you will, when you return in the morning, return at nine o'clock at the jury room, the bailiff will await you and you can commence with your deliberations. Have a good evening.

JUROR NORTON: Is it possible we can see the transcript or have the transcript of the trial?

THE COURT: You can have the transcript read to you by the court reporter and you could have any portion of the transcript reread to you at anytime that you wish.

JUROR NORTON: Okay.

THE COURT: And that is why we have the daily transcript in a case of this magnitude.

JUROR NORTON: Thank you.

THE COURT: All right. Have a good evening.

(Whereupon the jury was excused at 5:13 p.m. [2504] and the following proceedings were had outside the presence of the jury:)

MR. SCHICK: Judge, could he have a phone call so he would be able to talk to Mrs. Haro?

THE COURT: Sure.

MR. SCHICK: Thank you.

MR. WALL: Good night, Your Honor.

(Recess at 5:15 p.m.)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN JOAQUIN

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. FERNANDO BELMONTES, Defendant.	No. 32183 Dept. No. 7

The above-entitled matter came on regularly for hearing on Friday, August 6, 1982, at the hour of 11:14 a.m., before HON. WILLIAM R. GIFFEN, Judge of the Superior Court of the State of California, for the County of San Joaquin.

REPORTED BY: VICKI MARIE HAUNER, C.S.R. No. 4098 and JOHN SQUIRES, C.S.R. No. 2001

[2505] APPEARANCES OF COUNSEL:

CLARK SUEYRES, Deputy District Attorneys, Courthouse, Stockton, California, appeared as counsel for and on behalf of the People.

JOHN SCHICK, Attorney at Law, 2027 Grand Canal Boulevard, Stockton, California, appeared as counsel for and on behalf of the Defendant.

– – – o0o – – –

[2506] (Whereupon the following proceedings were had:)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called. The defendant is present.

We have a note from the jury requesting that certain testimony be reread to them. The jury would like to have read to them Fernando Belmontes' testimony and the pathologist's testimony. Also the testimony of Bob Bolanos. Signed James E. Norton, August 6th, '82. 10:56 a.m..

Yesterday, Mr. Sueyres –

MR. SUEYRES: I read the transcript.

THE COURT: We agreed that the testimony could be read to the jury in the juryroom or in the closed courtroom, which ever would be convenient to them. I have some question as to whether or not they want all of Mr. Belmontes' testimony in the guilt phase as well as the penalty phase. That is the only question that we have. That is number one.

MR. SUEYRES: My inclination would be to say to give it all to them. But I will defer to you on that.

THE COURT: Other question I have, would it be appropriate to allow the jury to read the transcript themselves without –

MR. SUEYRES: Judge, in researching another point, the Court made the comment with respect to the rule about past recollection recorded, that you could put on past recollection recorded by having the recorded statement [2507] read, but not by furnishing a transcript thereof because of the emphasis it gives. But again, I'll defer to the defense in this. If they want the transcript in, that is fine.

THE COURT: Mr. Schick?

MR. SCHICK: I have no real quarrel with the transcript. It may give them a better chance to discuss it. I've been involved in rereadings and you never know what they want. It may give them a chance to go through it at their own pace.

THE COURT: You would stipulate allowing the transcript be placed into custody of the jury?

MR. SCHICK: Yes.

THE COURT: Would you do that also, Mr. Belmontes?

THE DEFENDANT: Yes.

THE COURT: That doesn't present any problems with you?

THE DEFENDANT: No.

THE COURT: Mr. Sueyres?

MR. SUEYRES: Yes, fine.

THE COURT: Well allow the transcript to be provided to the jury for their reading process.

We have the motions and in chambers things.

MR. SQUIRES: We haven't looked to see if there are any in there.

THE COURT: I didn't know.

MR. SCHICK: I thought we would limit it to [2508] the part of these particular witnesses.

THE COURT: That means we will have to splice out pages. It will have to be edited. We have copies of those transcript.

MR. SCHICK: That does present a logistical problem.

MR. SUEYRES: I think there is a couple of conversations at the bench.

MR. SCHICK: Maybe we better revert to plan one and just have it read or want certain parts of it reread. As the reporter goes through it, I suppose they could have it reread to them as long as we limit it to just the testimony of the witnesses they've requested.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Back on the record. We will allow the parties to read through the transcript to determine whether or not there is any confidential information and in-chamber testimony and argument that would be found in the transcript, and those shall be deleted and that, which would be provided the jury, is solely the testimony of Mr. Belmontes, solely the testimony of Doctor Maduros and solely the testimony of Mr. Bolanos. That will be the order of the court.

(Recess at 11:23 a.m.)

MR. SCHICK: Should Mr. Sueyres and I work with the reporters in doing that, Judge?

THE COURT: I think so.

[2509] (Whereupon the jury was brought into the courtroom and the following proceedings were had:)

THE COURT: People of the State of California versus Fernando Belmontes, Jr. is called for further jury trial.

The record should reflect the jury is all present, the alternates are present, the defendant is present and we are ready to proceed.

Mr. Norton, I have your note concerning the reading of the testimony, and I gather that your request with reference to Mr. Belmontes' testimony is his testimony concerning the guilt phase of the trial or did you want –

JUROR NORTON: Yes it is, sir.

THE COURT: All right. What we have agreed to do by way of stipulation and agreement is that we're going to allow you to have the transcripts themselves. Rather than having the court reporter come in and read them, you will be able to have the transcripts as edited with reference to the testimony that you request, because some of the things that will be in that transcript will be things that happened in chambers so we have to take those out. And that is going to take the reporter and counsel a few minutes to do.

So I'm going to let you go to lunch and after lunch you will then be able to go through the transcript.

JUROR NORTON: We have one request. We do not want to go back to Taraminos (sic).

THE COURT: Trebino's?

[2510] JUROR NORTON: Whatever the name of that place.

THE COURT: You mean Heartburn Haven?

JUROR NORTON: I'd rather go to MacDonald's.

THE COURT: Your request is granted.

JUROR NORTON: My stomach also thanks you.

THE COURT: The alternate jurors also will have to be present during the analysis of the transcripts. We will have those available to you immediately after lunch.

JUROR NORTON: Thank you.

(Whereupon counsel approached the bench.)

THE COURT: All right.

Ladies and gentlemen, were going back on the record for a few minutes. It has been pointed out to me by counsel that this is not going to be a rereading of the transcript, and generally in a rereading of a transcript, why the alternate jurors will participate in the rereading. This is going to be somewhat of a unique situation, and so the fact that your rereading of the transcripts on your own is going to be part of your deliberation, and the fact that it is going to be part of your deliberation means that the alternate jurors will not participate in those deliberations. You still participate in lunch. Thank you.

(Whereupon court recessed at 11:31 a.m. and reconvened at 3:34 p.m. and the following proceedings were had:)

THE COURT: The record will reflect the jury is all present and accounted for. The defendant is present.

[2511] Mr. Norton, I understand the jury has reached a verdict?

JUROR NORTON: Yes. Yes, Your Honor.

THE COURT: Will you please hand it to the bailiff.

The clerk will read the verdict.

THE CLERK: Superior Court of California, County of San Joaquin.

The People of the State of California versus Fernando Belmontes, Jr., Defendant, Number 32183, Verdict.

We, the Jury in the above entitled cause, having found the defendant, Fernando Belmontes, Jr., guilty of a violation of Section 187 of the Penal Code of the State of California, to-wit: Murder, a felony, as charged and set forth in Count One of the Amended Information on file herein, and further having fixed the degree thereof to be Murder in the First Degree, and we having further found to be true the special circumstance charged and set forth in the Amended Information on file herein, to-wit: That the murder was committed while the defendant was engaged in the commission and attempted commission of burglary, a felony, in violation of Section 460 of the Penal Code, we do now fix the penalty at death. Dated August 6th, 1982, James E. Norton, foreman.

THE COURT: Did you wish the jury to be polled?

MR. SCHICK: Yes.

THE COURT: Ladies and gentlemen, we will [2512] poll the jury. As your name is called and you are asked whether or not the verdict called is yours, state yes or no.

THE CLERK: Ann Christansen, is the verdict as stated your verdict?

JUROR CHRISTANSEN: Yes.

THE CLERK: Diane Hern, is the verdict as stated your verdict?

JUROR HERN: Yes.

THE CLERK: Lloyd Huckabay, is the verdict as stated your verdict?

JUROR HUCKABAY: Yes.

THE CLERK: James Norton, is the verdict as stated your verdict?

JUROR NORTON: Yes.

THE CLERK: Betty Martin, is the verdict as stated your verdict?

JUROR MARTIN: Yes.

THE CLERK: Michael Thompson, is the verdict as stated your verdict?

JUROR THOMPSON: Yes.

THE CLERK: Katryna Hailstone, is the verdict as stated your verdict?

JUROR HAILSTONE: Yes.

THE CLERK: Mary Schenone, is the verdict as stated your verdict?

JUROR SCHENONE: Yes.

THE CLERK: Grace Wilson, is the verdict as stated your verdict?

[2513] JUROR WILSON: Yes.

THE CLERK: Thomas Giles, is the verdict as stated your verdict?

JUROR GILES: Yes.

THE CLERK: Elaine Schilling, is the verdict as stated your verdict?

JUROR SCHILLING: Yes.

THE CLERK: Ronald Meyer, is the verdict as stated your verdict?

JUROR MEYER: Yes.

THE COURT: The record and minutes will reflect the jury has been properly polled and in the presence of the defendant.

Ladies and gentlemen, it was not an easy case. I wish to commend you for what you've done and it was not easy, as I say. I thank you. You will be discharged.

If you wish to talk to counsel now you may certainly do so. I'm sure Mr. Schick and Mr. Sueyres will have some questions they may want you to answer. You can talk to them now if you so desire. You don't have to. If they call you at home, which they are allowed to do, you can talk to them as well. Thank you. You are discharged.

(Whereupon the following proceedings were at out of the presence of the jury at 3:37 p.m.:)

THE COURT: We will receive a stipulation from counsel to allow the clerk to enter the verdict of the jury out of the presence of the jury?

MR. SCHICK: Yes.

[2514] THE COURT: Mr. Sueyres?

MR. SUEYRES: Yes, Your Honor.

Your Honor, there is one matter that I had spoken to Mr. Schick and would request to place on calendar. It regards juror number 38, Mr. Meyer or Juror Number 12, Mr. Meyer. During the course of the guilt phase I observed a lady in the courtroom to be talking to Mr. Meyer, and later I had occasion to speak to her myself during the recess. It developed that it was Mr. Schick's secretary. And just to satisfy myself, I had asked her if she had discussed anything about the trial and she said she had not. And I believe that to be the case. But because some question has been raised concerning Mr. Meyer at an earlier time, I thought it appropriate that that occurred as well should be placed on the record.

THE COURT: Did you know anything about that matter, Mr. Schick?

MR. SCHICK: I told Mr. Sueyres this morning. Her father is a minister in Lodi and Mr. Meyer belongs to that church, so he knew her and they were chatting.

THE COURT: All right. We will have to set the matter for hearing with reference to modification.

MR. SCHICK: Yes.

THE COURT: What is your pleasure, Mr. Schick.

I would assume that the motion for modification should be made at the same time you have your other motions that you will want to make?

[2515] MR. SCHICK: Yes, Judge. I believe the motion under 1181.7 is automatic.

I would request a few weeks, because I would like to put together some points and authorities in regard to that and some other things.

THE COURT: All right.

MR. SCHICK: Today is the 6th. Could I suggest the 3rd of September?

THE COURT: The 3rd of September.

MR. SCHICK: That is four weeks away. That should give me enough time. I will be gone for a few weeks in there.

THE COURT: Time waived?

MR. SCHICK: Time is waived.

What time do you want that, Judge.

THE COURT: Ten o'clock.

We have the transcripts requested by the jury to be read, and what I would like to do is have them marked and made part of the record to be sent to the Supreme Court as part of the record so they will know what the jury did read, and that would be the statements and testimony of Robert Gilbert Bolanos, we'll make that People's Number 32 – what is the next one?

MR. SUEYRES: Perhaps you should mark it as the Court's exhibit, Your Honor.

THE COURT: It will be my exhibit, Court's Exhibit 1.

The testimony of Fernando Belmontes, Jr., will be [2516] Court's Exhibit 2.

The testimony of Bill P. Maduros, M.D., will be Court's Exhibit 3. They shall become part of the record.

(Whereupon transcripts were marked as Court's Exhibit Numbers 1, 2 and 3 and received in evidence.)

MR. SUEYRES: Your Honor, while we spoke of doing it, I think it is appropriate to put on the record the fact that Mr. Schick and I met with the Court Reporters during the lunch hour and went over very carefully the parts of the transcript that had to be deleted because there were objections and inappropriate comments, and –

MR. SCHICK: That is correct.

THE COURT: You joined in that?

MR. SCHICK: We agreed to that proceeding and all deletions were agreed to buy both myself and Mr. Sueyres and were made part of the transcript.

THE COURT: And you participated with the court reporters in analyzing those statements?

MR. SCHICK: Yes.

MR. SUEYRES: Yes, Your Honor.

THE COURT: Okay. After the motion for modification is made, then Mr. Belmontes will be referred to the Probation Department. September 10th?

MR. SCHICK: 3rd. Friday, September 3rd.

THE COURT: Ten a.m..

MR. SCHICK: May Mr. Belmontes have a few phone calls?

[2517] THE COURT: Certainly.

(Recess at 3:43 p.m.)

No. 01-99018

IN THE NINTH CIRCUIT COURT OF APPEALS

FERNANDO BELMONTES, Petitioner and Appellant, vs. JEANNE WOODFORD, WARDEN, Respondent and Appellee.	) DC No.) CV-89-073 DFL (JFM)

APPELLANT'S OPENING BRIEF

(Death Penalty Case)

ERIC S. MULTHAUP
SBN 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
(415) 821-6000
(415) 389-0865 (fax)

CHRISTOPHER H. WING
SBN 63214
1101 E Street
Sacramento, CA 95814
(916) 441-4888
(916) 441-1575 (fax)

Attorneys for Petitioner and Appellant FERNANDO BELMONTES

TOPICAL INDEX

	Page
APPELLANT'S OPENING BRIEF	1
JURISDICTIONAL STATEMENT	1
STATEMENT OF ISSUES PRESENTED	2
STATEMENT OF THE CASE	4
STATEMENT OF FACTS	6

A. Guilt Phase 6
1. The prosecution's evidence 6
2. The defense case 12
B. Penalty Phase 15
1. The prosecution's evidence in aggravation. 15
2. The defense evidence in mitigation 15
ARGUMENT 19
I. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE REGARDING APPELLANT'S BACKGROUND, CHARACTER, MENTAL STATE, AND POSITIVE PRISON ADJUSTMENT 23
A. Counsel's Undisputed Failure to Conduct An Adequate Investigation 23
B. The Overwhelming Demonstration of Prejudice 28
1. The deficiencies in the District Court's discussion of prejudice 28
2. The wealth of mitigating evidence that could have been presented 38
a. Alcoholism and domestic violence against appellant's mother 38
b. Demeaning and discriminatory treatment of Fernando, Sr. by the Salvaggio family 38
c. Circumstances of objective and comparative poverty during appellant's early childhood 39

d. Appellant's positive achievements during his youth in Little League, the Cadets, and his employment in the face of obstacles..... 40

e. Onset of rheumatic fever at approximately age 10 and curtailment of activities..... 44

f. Subjective adversity, fears of premature death..... 46

g. Depression as a consequence of the rheumatic fever and enforced isolation..... 46

h. The breakup of his home following mother's second divorce in 1977..... 47

i. Appellant's involvement in teenage criminality and youth gang support... 48

j. Anti-Hispanic racial attitudes at high school..... 49

k. Positive prior institutional adjustment and positive future prospects.... 49

3. The weakness of the evidence that was presented..... 51

4. The unprepossessing case in aggravation..... 56

5. The closeness of the case as demonstrated by the course of jury deliberations..... 59

6. The failure to grant an evidentiary hearing..... 60

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL BENEFITS CONFERRED ON THE START ACCOMPLICE WITNESS, BOBBY BOLANOS, AND BY THE FAILURE TO CORRECT FALSE AND MISLEADING TESTIMONY THAT NO SUCH BENEFITS EXISTED 62

A. The Undisputed Failure to Disclose Material Impeachment Evidence and the Failure to Correct False Testimony 62

B. The District Court's Erroneous Assessment of Prejudice 64

1. The District Court's failure to recognize and consider the dismissals as a source of continuing bias in favor of the prosecution 65

2. The District Court's failure to recognize and consider the prejudicial effect of the prosecution's failure to correct false testimony during trial 67

3. The District Court's erroneous assessment of other incriminating evidence ... 68

III. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S USE OF INCULPATORY STATEMENTS WHICH WERE INVOLUNTARILY EXTRACTED BY POLICE OFFICERS WHO THREATENED APPELLANT WITH THE DEATH PENALTY AND THEN OFFERED A HOPE OF LENIENCY THROUGH CONFESSION 71

IV. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO CHALLENGE THE LAWFULNESS OF APPELLANT'S ARREST AND THE VALIDITY OF THE ATTENDANT SEIZURE OF PROPERTY 73

V. APPELLANT WAS DEPRIVED OF DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE CONFLICT OF INTEREST RESULTING FROM THE MULTIPLE PRIOR REPRESENTATIONS OF CODEFENDANT VASQUEZ BY DEFENSE COUNSEL, HIS CURRENT PARTNERS, AND A FORMER ASSOCIATE, AND BY THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY AND ADVISEMENT OF THE NOTICE AND CONSEQUENCES OF THE CONFLICT 75

A. The District Court's Error Regarding the Severity of the Conflict of Interest 77

B. The District Court's Error Regarding the Trial Court's inquiry 83

VI. APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN THE PROSECUTOR CROSS-EXAMINED HIM AS TO HIS POST-CHARGING SILENCE REGARDING THE SUBSTANCE OF HIS EVENTUAL TESTIMONY 88

VII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS RIGHT OF CONFRONTATION BY THE TRIAL COURT'S REFUSAL TO PERMIT CROSS-EXAMINATION OF CARRIE VASQUEZ REGARDING HER BIAS AND MOTIVE TO FABRICATE TESTIMONY AGAINST APPELLANT 88

VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE REPEATED AND CUMULATIVE EVIDENTIARY AND INSTRUCTIONAL ERRORS, WHICH IMPROPERLY BOLSTERED THE TESTIMONY OF PROSECUTION WITNESS BOBBY BOLANOS 90

IX. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY BY THE COUNTY'S USE OF JURY VENIRE SELECTION PROCEDURES WHICH SYSTEMATICALLY EXCLUDED MINORITY JURORS 90

X. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY NUMEROUS INSTANCES OF JURY MISCONDUCT .. 91

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES 93

XII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ERRONEOUS ADMISSION OF EVIDENCE OF PRIOR MISCONDUCT 95

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ARBITRARY AND DISCRIMINATORY MANNER IN WHICH THE DEATH PENALTY WAS CHARGED AND IMPOSED IN HIS CASE 95

XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S REFUSAL TO ADEQUATELY RESPOND TO THE JURY'S QUESTION ABOUT THE CONSEQUENCES OF THEIR FAILURE TO AGREE ON A PENALTY 99

XV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIBUNAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S PREJUDGMENT OF THE MOTION TO REDUCE APPELLANT'S DEATH SENTENCE 100

CONCLUSION 101

STATEMENT OF RELATED CASES 102

CERTIFICATE OF COMPLIANCE 102

* * *

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES.

The trial court committed constitutional error in this case that is functionally indistinguishable from that which required granting habeas corpus relief in *Penry* v. *Johnson*

532 U.S. 782, S.Ct. 1910 (2001). *Penry* issued habeas corpus relief because the penalty phase instructions circumscribed the jury's consideration of mental state mitigating evidence regarding retardation. Here, the jury specifically asked for judicial guidance during penalty deliberations regarding the scope of mitigation, the nature of the decision process, and the consequences of a hung jury: The trial court's instructions circumscribed the jury's consideration of non-statutory mitigation evidence regarding appellant's background and his positive conduct while in the M-2 program in youth authority.

Reversal is required because, just as *Penry* found, "The jury received mixed signals" as to the import of the mitigating evidence, and these mixed signals were sufficient to establish a reasonable possibility that one or more jurors misapplied the correct constitutional standard under *Boyde* v. *California* 494 US 370, 380 (1990). *Penry*, supra, 121 S.Ct. at 1923.

The District Court erroneously concluded that in light of the overall instructions and argument, no prejudice was shown. However, the offending instruction here were given during the crucible of jury deliberations, and would have been paramount in the jurors' minds when they actually returned the death verdict. Just as the Supreme Court in *Penry* was "skeptical that, by the time their penalty deliberations began, the jurors would have remembered the explanations given during voir dire," 121 S.Ct. at 1923, this Court should be equally skeptical that the jurors relied on previously given instructions to guide their deliberations, rather than on the responses to the very specific questions posed during deliberations.

* * *

01-99018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner-Appellant, **v.** **JOANNE WOODFORD, Warden,** Respondents-Appellees.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Eastern District of California
No. CV S-89-0736 DFL JFM
The Honorable David F. Levy, Judge

APPELLEE'S BRIEF

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

ARNOLD O. OVEROYE
Senior Assistant Attorney General

MARK A. JOHNSON
Deputy Attorney General
State Bar No. 179141

1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960

Attorneys for Respondents-Appellees

TABLE OF CONTENTS

	Page
STATEMENT OF JURISDICTION	1
STATEMENT OF THE CASE	1
STATEMENT OF FACTS	2
STANDARD OF REVIEW	3
SUMMARY OF ARGUMENT	4
ARGUMENT	5
I. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON THE FAILURE TO PRESENT MITIGATING EVIDENCE DURING THE PENALTY PHASE TRIAL	5
A. Appellant's Ineffective Assistance Claims Were Properly Denied Because They Were Not Procedurally Cognizable In Federal Habeas	6
B. Defense Counsel Competently Prepared For And Conducted The Penalty-Phase Trial	9
C. Appellant Was Not Prejudiced By Trial Counsel's Alleged Ineffectiveness	33
II. THE DISTRICT COURT WAS WITHIN ITS DISCRETION IN DENYING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING REGARDING HIS CLAIM OF INEFFECTIVE ASSISTANCE FOR FAILURE TO INVESTIGATE OR PRESENT THE PROFFERED MITIGATING EVIDENCE IN THE PENALTY-PHASE TRIAL	45

III. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION BASED ON THE PROSECUTION'S ALLEGED FAILURE TO DISCLOSE MATERIAL BENEFITS TO A WITNESS 49

A. Factual Background 49

B. Appellant's Claim Of "Material Benefits" Does Not Disclose Constitutional Error Warranting Habeas Relief 51

IV. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM THAT HIS INCULPATORY PRETRIAL STATEMENTS WERE INVOLUNTARY BECAUSE OF POLICE COERCION 58

V. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM OF INEFFECTIVE ASSISTANCE BASED ON TRIAL COUNSEL'S FAILURE TO CHALLENGE THE ARREST WARRANT IN THIS CASE 60

VI. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM THAT TRIAL COUNSEL LABORED UNDER A CONFLICT OF INTEREST 64

VII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF *DOYLE* ERROR 78

VIII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION STEMMING FROM THE LIMITATION OF HIS ABILITY TO CROSS-EXAMINE KARRIE ROGERS 81

IX. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION RELATING TO EVIDENCE INTRODUCED TO CORROBORATE BOBBY BOLANOS'S TESTIMONY... 85

X. THE DISTRICT COURT PROPERLY REJECTED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION STEMMING FROM THE JURY VENIRE SELECTION PROCEDURES IN SAN JOAQUIN COUNTY..... 87

XI. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN DENYING AN EVIDENTIARY HEARING ON APPELLANT'S CLAIM OF JUROR MISCONDUCT..... 90

XII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON ALLEGEDLY ERRONEOUS INSTRUCTIONS REGARDING THE JURY'S SENTENCING RESPONSIBILITIES..... 94

XIII. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON THE INTRODUCTION OF PENALTY-PHASE EVIDENCE OF UNADJUDICATED PRIOR INSTANCES OF MISCONDUCT..... 99

XIV. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION, AN EQUAL PROTECTION VIOLATION, AND CRUEL AND UNUSUAL PUNISHMENT BASED ON THE CLAIM THAT APPELLANT'S DEATH JUDGMENT RESULTED FROM AN ARBITRARY AND DISCRIMINATORY CHARGING DECISION 101

XV. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON THE TRIAL COURT'S ANSWER TO A JURY QUESTION ABOUT THE CONSEQUENCES OF A FAILURE TO REACH A VERDICT 107

XVI. THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON A LETTER THE TRIAL COURT SENT TO THE JURORS FOLLOWING THE PENALTY-PHASE TRIAL 110

CONCLUSION 113

STATEMENT OF RELATED CASES 114

* * *

XII.

THE DISTRICT COURT PROPERLY DENIED APPELLANT'S CLAIM OF A DUE PROCESS VIOLATION AND CRUEL AND UNUSUAL PUNISHMENT BASED ON ALLEGEDLY ERRONEOUS INSTRUCTIONS REGARDING THE JURY'S SENTENCING RESPONSIBILITIES

Appellant next claims the trial court gave the jury erroneous instructions which somehow "circumscribed the jury's consideration on non-statutory mitigation evidence." (AOB 94.) Although it is unclear, the claim *appears* to relate to Appellant's "claim B-3" previously raised in the district court. That claim pertains to a brief exchange between the trial court and one of the jurors in a meeting during jury deliberations following the penalty phase trial:

> Juror Hern: The statement about the aggravation and mitagation [sic] of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process.

(RT 2502-2502.).

Appellant now apparently claims, for the first time, that the exchange between the court and Juror Hern mandates reversal of the judgment under *Penry v. Johnson,* 532 U.S. 782 (2001). In this regard, Appellant characterizes the trial court's brief response to Juror Hern's

question as being an improper jury instruction which allowed the jury to disregard the "non-statutory mitigating evidence" presented in the penalty-phase trial. (AOB 93-95.)

Appellant's newfound reliance on *Penry* is misplaced. In *Penry*, the decision of whether a death sentence was appropriate rested entirely on the jury's factual determination of three statutorily mandated "special issues." The jury was also given a "supplemental instruction" which said to consider mitigating circumstances when deliberating on the "special issues." *Id.* at 782-783.

The High Court found the "supplemental instruction" was constitutionally insufficient because, although the jury was told to consider mitigating circumstances, "the jury's ability to consider and give effect to Penry's mitigating evidence was still 'shackled and confined within the scope of the three special issues.' [Citation]." *Id.* at 798. Because the use of mitigating evidence was limited solely to its use in proving or disproving the three "special issues," the jury was given "no vehicle" for expressing a view that Penry might not deserve a death sentence based on his mitigating evidence of mental retardation and child abuse, which had no relevance to any of the "special issues." *Id.* at 976-804.

The present issue bares no resemblance to *Penry*. Unlike in *Penry*, the jury here was told nothing to suggest their evaluation of any mitigating evidence, or the weight to be attributed thereto, was in any way limited. To the contrary, the jury here was expressly instructed that "the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes . . . Any

one of them, standing alone, may support a decision that death is not the appropriate punishment in this case." (CT 1084; RT 2496.)

Moreover, the present issue does not involve a faulty instruction but, rather, concerns the trial court's rather informal response to one of the juror's questions. Assuming, arguendo, these informal remarks by the judge might somehow be construed as potentially misleading "jury instructions," Appellant is still unable to provide any basis for relief.

A claim an instruction was subject to an erroneous interpretation does not establish a due process violation unless there is a "reasonable likelihood that the jury has applied" the instruction in a way that violates the Constitution. *Estelle v. McGuire,* 502 U.S. 62, 72 (1991); *Boyde v. California,* 494 U.S. 379, 380 (1990).

There is no such chance here. Juror Hern's inquiry did not convey a misunderstanding about the factors to be considered in the penalty phase deliberations. Her use of the word "listing" did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically listed. Nor did her use of the metaphor, "balance the sheet," convey an unconstitutionally restrictive understanding of the jury's role in penalty-phase determinations. Moreover, as noted, the court never said anything to indicate the jurors were limited or in any way restricted from using any mitigating evidence in any way they saw fit in determining whether Appellant deserved a death sentence. Indeed, the court's answer to Juror Hern's question properly characterized the balancing process of penalty-phase determinations under California law. *See People v. Bacigalupo*, 6 Cal.4th 457, 470 (1993).

Furthermore, "a single instruction to a jury may not be judged in artificial isolation," but must be viewed in the context of the instructions as a whole and the entire record. The question is whether the ailing instruction by itself so infected the entire trial that the resulting judgment violates due process. *Estelle,* at 72; *Cupp v. Naughten,* 414 U.S. 141, 147 (1973). A theoretical or abstract claim does not establish constitutional error. *Cupp,* at 148-149.

As noted, the jurors here were expressly instructed they were not limited to any preordained mitigating circumstances and that their finding of any single mitigating circumstance could be sufficient to support a decision that death was not the appropriate punishment in this case. (CT 1084; RT 2496.) Moreover, the closing arguments on both sides made it clear the jury was to consider and weigh all of Appellant's mitigating evidence. (RT 2452-2462, 2472-2479.)

In sum, the jury very clearly understood they could consider any evidence in mitigation and give any such evidence whatever weight they felt it deserved. There is virtually no chance the jury applied the judge's remarks to Juror Hern in a way that violated the Constitution, and there is no chance the judge's remarks were enough by themselves to "infect the entire trial" sufficient to violate due process. Again, the district court properly rejected this claim.

* * *

No. 01-99018

IN THE NINTH CIRCUIT COURT OF APPEALS

FERNANDO BELMONTES, Petitioner and Appellant, vs. JEANNE WOODFORD, WARDEN, Respondent and Appellee.	DC No. CV-89-073DFL(JFM)

APPELLANT'S RELY BRIEF

(Death Penalty Case)

ERIC S. MULTHAUP
SBN 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
(415) 821-6000
(916) 389-0865 (fax)

CHRISTOPHER H. WING
SBN 63214
1101 E Street
Sacramento, CA 95814
(916) 441-4888
(916) 441-1575 (fax)

Attorneys for Petitioner
and Appellant
FERNANDO BELMONTES

TOPICAL INDEX

Page

APPELLANT'S REPLY BRIEF 1

I. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT MITIGATING EVIDENCE REGARDING APPELLANT'S BACKGROUND, CHARACTER, MENTAL STATE, AND POSITIVE PRISON ADJUSTMENT. 1

A. *Appellee's Argument Regarding Lack of Exhaustion is Frivolous.* 1

B. *Defense Counsel's Failure to Conduct Any Inquiry into Penalty Phase Mental State Mitigation Evidence Was Unreasonable.* 6

C. *Counsel's Failure to Investigate Was Extremely Prejudicial* 12

1. Appellee's misguided efforts to distinguish the law of penalty phase prejudice 12

2. Appellee's failure to acknowledge the evidence in the record of appellant's brain damage as a mitigating factor.

3. Appellee's misunderstanding of the value of expert mental state testimony in mitigation. 16

4. The rebuttal phantom. 21

5. The unprepossessing aggravation in this case. 23

6. The overall deficiency in the penalty presentation 25

7. The jury deliberations confirm that additional mitigation would have likely resulted in a life verdict. 27

D. The District court's error in denying an evidentiary hearing 27

II. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S FAILURE TO DISCLOSE MATERIAL BENEFITS CONFERRED ON THE START ACCOMPLICE WITNESS, BOBBY BOLANOS, AND BY THE FAILURE TO CORRECT FALSE AND MISLEADING TESTIMONY THAT NO SUCH BENEFITS EXISTED. 30

III. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE PROSECUTION'S USE OF INCULPATORY STATEMENTS WHICH WERE INVOLUNTARILY EXTRACTED BY POLICE OFFICERS WHO THREATENED APPELLANT WITH THE DEATH PENALTY AND THEN OFFERED A HOPE OF LENIENCY THROUGH CONFESSION. 35

IV. APPELLANT WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL BY COUNSEL'S FAILURE TO CHALLENGE THE LAWFULNESS OF APPELLANT'S ARREST AND THE VALIDITY OF THE ATTENDANT SEIZURE OF PROPERTY. 37

V. APPELLANT WAS DEPRIVED OF DUE PROCESS AND THE EFFECTIVE ASSISTANCE OF COUNSEL DUE TO THE CONFLICT OF INTEREST RESULTING FROM THE MULTIPLE PRIOR REPRESENTATIONS OF CODEFENDANT VASQUEZ BY DEFENSE COUNSEL, HIS CURRENT PARTNERS, AND A FORMER ASSOCIATE, AND BY THE TRIAL COURT'S FAILURE TO CONDUCT AN ADEQUATE INQUIRY AND ADVISEMENT OF THE NOTICE AND CONSEQUENCES OF THE CONFLICT. 38

VI. APPELLANT WAS DEPRIVED OF DUE PROCESS WHEN THE PROSECUTOR CROSS-EXAMINED HIM AS TO HIS POST-CHARGING SILENCE REGARDING THE SUBSTANCE OF HIS EVENTUAL TESTIMONY..... 41

VII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND HIS RIGHT OF CONFRONTATION BY THE TRIAL COURT'S REFUSAL TO PERMIT CROSS-EXAMINATION OF CARRIE VASQUEZ REGARDING HER BIAS AND MOTIVE TO FABRICATE TESTIMONY AGAINST APPELLANT..... 42

VIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY THE REPEATED AND CUMULATIVE EVIDENTIARY AND INSTRUCTIONAL ERRORS, WHICH IMPROPERLY BOLSTERED THE TESTIMONY OF PROSECUTION WITNESS BOBBY BOLANOS..... 43

IX. APPELLANT WAS DEPRIVED OF DUE PROCESS, A FAIR TRIAL, AND A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY BY THE COUNTY'S USE OF JURY VENIRE SELECTION PROCEDURES WHICH SYSTEMATICALLY EXCLUDED MINORITY JURORS..... 43

X. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL BY NUMEROUS INSTANCES OF JURY MISCONDUCT.. 43

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES. 44

XII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ERRONEOUS ADMISSION OF EVIDENCE OF PRIOR MISCONDUCT..... 51

XIII. APPELLANT WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE ARBITRARY AND DISCRIMINATORY MANNER IN WHICH THE DEATH PENALTY WAS CHARGED AND IMPOSED IN HIS CASE. 51

XIV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S REFUSAL TO ADEQUATELY RESPOND TO THE JURY'S QUESTION ABOUT TILE CONSEQUENCES OF THEIR FAILURE TO AGREE ON A PENALTY. 53

XV. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIBUNAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE TRIAL COURT'S PRE-JUDGMENT OF THE MOTION TO REDUCE APPELLANT'S DEATH SENTENCE. 53

CONCLUSION 55
CERTIFICATE OF COMPLIANCE 56
CERTIFICATE OF RELATED CASES 56

* * *

XI. APPELLANT WAS DEPRIVED OF DUE PROCESS AND A FAIR PENALTY TRIAL, AND WAS SUBJECTED TO CRUEL AND UNUSUAL PUNISHMENT BY THE COURT'S ERRONEOUS INSTRUCTIONS TO THE JURY REGARDING THEIR SENTENCING RESPONSIBILITIES.

Appellee acts as if there is some question as to the provenance of this claim, remarking that "[a]lthough it is unclear, the claim *appears* to relate to appellant's 'claim B-3' previously raised in the district court," AG 94. *Of course,* this claim is the same claim of jury instruction error identified as B-3 in the proceedings below. The culmination of the instructional error occurred during the colloquy between juror Hern and the trial court during penalty deliberations:

> "Juror Hern: the statement about the aggravation and mitagation [sic] of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process." RT 2501-2.

Appellant has been arguing that since the direct appeal in 1982, this mid-deliberation instruction constituted an Eighth Amendment violation under controlling authority of the United States Supreme Court, including *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987). The crux of appellant's claim is that the jury must necessarily have been laboring under a misapprehension that they were restricted to a consideration of statutorily enumerated mitigating factors, and that their responsibility with respect to this circumscribed list of factors was simply to "balance the sheet" in some mechanical, arithmetic fashion. Otherwise, juror Hern would never have interrupted the deliberations to ask the series of questions that she did. Both the District court and appellee argue that *preceding* instructions correctly encapsulated law for the jury, but those instructions were legally suspect and factually ineffective; otherwise the mid-deliberation questions would never have arisen. Nothing occurred *after* the mid-deliberation colloquy to get the jurors back onto the constitutionally correct track.

Appellee appears to chide counsel for appellant for citing *Penry* v. *Johnson*, 532 U.S. 782 (2001) in his opening brief, pejoratively referring to "[a]ppellant's newfound reliance on *Penry*," AG 95, as if this reference to *Penry* somehow constituted an alteration of the argument. To the contrary, *Penry* drives home the nail that appellant has been pounding on for more than 15 years, i.e., that the jury was unconstitutionally misdirected and restricted to consideration of statutory factors in the penalty deliberations. When juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that was the listing?"; the trial court erroneously answered, "Yes, that was the listing." However, the constitutionally

correct answer was "no," followed by, at a minimum, a reiteration of the previously given instruction that "the mitigating circumstances I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as the reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." However, the trial court confirmed juror Hern's misunderstanding that there was a finite of list of mitigating factors, rather than disabuse her and the other jurors of that incorrect understanding.

The incorrect understanding was reiterated when juror Hern immediately asked, "Of those certain factors, we were to decide one or the other and then balance the sheet?" Juror Hern clearly understood that there was a *certain,* i.e., finite, list of factors, which were to be determined as either weighing in aggravation or weighing in mitigation, and then the jury would "balance the sheet." The court confirmed that improper understanding, and unconstitutionally constrained juror Hern and all the other jurors present during the colloquy to a consideration of the statutorily enumerated factors, with the idea of non-statutory mitigation being excised from meaningful consideration.

The trial court should have told the jury that there was no "certain" list of factors, but rather that any and all evidence presented by appellant could be considered in mitigation, and any particular piece of that evidence could be sufficient to support a vote for a life verdict. The trial court failed to do so, and the jury concluded its penalty deliberations under an unconstitutional misapprehension.

Appellee simply cannot be correct that the earlier and ineffectual instructions could have cured the error

occurred [sic] during the mid-deliberation colloquy. At best, the preceding instructions provided the jury with mixed signals, which the jury did not understand and process, after which they got a final set of clearly erroneous signals during the Hern colloquy. *Penry* is clear that "mixed signals" as to the import of mitigating evidence require habeas corpus relief.

Shafer v. *South Carolina,* 532 U.S. 36, 53 (2002) clearly recognized that a question from a capital jury during deliberation regarding the parameters of their deliberations leaves "no doubt about [the jury's] failure to gain from . . . the judge's instructions any clear understanding of what a life sentence means." It does not require a pronouncement of the United States Supreme Court to establish the commonsense principle that if jurors ask questions about what they are supposed to do, the inference is compelled that the instructions previously given to them did not supply the answers. More recently, *Kelly* v. *South Carolina,* 534 U.S. 246 (2002) reconfirmed this commonsense view with the observation that "the jurors' questions in *Simmons* and *Shafer* confirms the inadequacy of the charges in those cases . . . "

Appellee appears to demonstrate unfamiliarity with the Supreme Court's cases regarding jury instructions and jury questions by suggesting that "The present issue does not involve a faulty instruction but, rather, concerns the trial court's rather informal response to one of the jurors' questions," as if mid-deliberation jury questions and judicial answers were mere flotsam on the stormy seas of litigation. To the contrary, commonsense and case law from *Bollenbach* v. *Unitd States,* 326 U.S. 607 (1946) through *Simmons* through *Shafer* confirmed that a trial court's response to mid-deliberation jury questions is

crucial in assuring that the jurors have a correct understanding of the law when they ultimately arrive at a decision.

The flagrant misinstruction during the mid-deliberation colloquy in fact compounded the problem generated from the earlier restrictive instruction that recently required relief in *Payton* v. *Woodford,* U.S. App. Lexus 15416 (2002). Both *Payton's* jury and appellant's jury were instructed in the then standard language of CALJIG 8.84.1 (4th Edition, 1979), which lists the statutorily enumerated factors including Factor K, describing the final factor as any circumstances "which extenuates the gravity of the crime even though it is no [sic] a legal excuse for the crime." This Court reversed Payton's death sentence because the instruction likely constrained the jury's consideration of Payton's post-offense conversion to Christianity and good work while in jail. The combination of the constricted Factor (k) instruction and its restrictive reiteration during the *Hern* colloquy renders it likely that the jury disregarded appellant's mitigating evidence regarding his religious efforts while in CYA and his prospects for good institutional adjustment if given a life sentence.

The bottom line is that the trial court's failure to ensure that the jury had a proper understanding of its sentencing responsibilities when juror Hern posed the crucial questions during deliberations violated the Eighth Amendment. *Payton* recognized that "[t]he year after the jury pronounced Payton's death sentence [1982], the California Supreme Court recognized the potential for jury confusion inherent in the wording of factor (k) citing *People* v. *Easley,* 34 Cal.3d 858 (1983) [where's ending quote?]. The instruction was amended to include a direction that the

jury may consider "any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial." CALJIG 8.85(k) (6th Edition, 1996).

The District court clearly erred in its conclusion that the jury was not misled by the trial court's responses to the Hern colloquy, particularly where the seeds of confusion were clearly sown in the earlier unadorned factor (k) instruction that by itself required relief in *Payton*. *Payton* emphasizes that "Standing alone, the factor (k) instruction is unconstitutional as applied to post-crime evidence." Appellant's mitigating evidence regarding his prospects for good institutional adjustment was unfairly diminished by the unconstitutional instruction because future conduct in prison, however exemplary, "cannot possibly 'extenuate the gravity of the crime'," *Payton*, Lexis p. 21.

While appellee argues that "The prison issue bares [sic] no resemblance to *Penry*," AG 95, this Court held that *Penry* expressly confirmed its conclusion that "There was a reasonable likelihood that the jury did not consider Payton's mitigation evidence." Ibid. The crux of the *Penry* ruling is that the trial court must provide the jury with an instructional "vehicle" to give full consideration to all of a defendant's mitigating evidence. The trial court's responses to the Hern questions deprived the jury of that necessary vehicle.

Regarding the final determination of harmless error, *Payton* concluded that "[p]lacing the 'risk of doubt' on the state is also consistent with the body of jurisprudence that has placed the burden of showing lack of prejudice on the party who would benefit from the constitutional error."

Even though *Peyton* was convicted of a brutal rape murder and the attempted murder of a mother and her child in the same transaction, this Court found that the circumstances of the offense, while undeniably "brutal," in no way overcame the inhibitions on the consideration of mitigating evidence. The District court in this case recognized that "The aggravating evidence actually presented to the jury did not make this a clear-case for application of the death penalty," ER 8, p. 49. Moreover, appellant's argument XIII, infra, regarding the arbitrary and discriminatory imposition of the death sentence in San Joaquin County, demonstrates that the circumstances of appellant's crime fall within the lowest echelon of heinousness among capital-eligible murders. Under these circumstances, the erroneous restrictions on the jury in considering appellant's mitigating evidence must be deemed prejudicial under *Payton* and *O'Neal* v. *McAnnich*, 513 U.S. 432, 435 (1995).

* * *

01-99018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner-Appellant, **v.** **JEANNE WOODFORD, Warden,** Respondents-Appellees.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Eastern District of California
No. CV S-89-0736 DFL JFM
The Honorable David F. Levy, Judge

PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

MARK A. JOHNSON
Deputy Attorney General
State Bar No. 179141

1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960

Attorneys for Respondents-Appellees

TABLE OF CONTENTS

	Page
INTRODUCTION	1
I. THE MAJORITY OPINION CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *BOYDE*	3
II. THE MAJORITY OPINION MISAPPLIES THE CONTROLLING STANDARD FOR ASSESSING CONSTITUTIONAL ERROR ENUNCIATED IN *BOYDE*	10
III. THE MAJORITY OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE V. LANE*, 489 U.S. 288	16
CONCLUSION	19

TABLE OF AUTHORITIES

Cases **Page**

Belmontes v. Calderon, 488 U.S. 1034 (1989) 17

Boyde v. California, 494 U.S. 370 (1990) .....1, 3-5, *passim*

Butler v. McKellar, 494 U.S. 407 (1990) 16

California v. Brown, 479 U.S. 538 (1987) 9

Caspari v. Bohlen, 510 U.S. 383 (1994) 16, 17

Cupp v. Naughten, 414 U.S. 141 (1973) 13

Graham v. Collins, 506 U.S. 461 (1993) 16

Penry v. Lynaugh, 492 U.S. 302 (1989) 16

People v. Bacigalupo, 6 Cal.4th 457 (1993) 13

People v. Crittenden, 9 Cal.4th 83 (1994) 13

Skipper v. South Carolina, 476 U.S. 1 (1986) 6, 8, 11, 14, 17

Stringer v. Black, 503 U.S. 222 (1992) 16

Teague v. Lane, 489 U.S. 288 (1989) 2, 16, 18

Court Rules

Federal Rules of Appellate Procedure, rule 35(a) 1

Federal Rules of Appellate Procedure, rule 40(a)(2) 1

Other Authorities

California Jury Instructions, Criminal [CALJIC] No. 1.03 13

California Jury Instructions, Criminal [CALJIC] No. 8.84.1 (4th Ed 1979) 3

01-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner-Appellant, **v.** **JEANNE WOODFORD, Warden,** Respondents-Appellees.	**CAPITAL CASE**

INTRODUCTION

Appellee respectfully seeks rehearing of this Court's order filed July 15, 2003. The Court's majority opinion overlooks or misapprehends particular points of law. FRAP 40(a)(2). In the alternative, Appellee seeks rehearing en

banc. FRAP 35(a). The majority held that it was reasonably likely the jury was misled to believe that it could not consider mitigating evidence of Belmontes' potential and good behavior in prison. This decision conflicts with, and misapplies the controlling standard for assessing constitutional error enunciated in, the United States Supreme Court's holding in *Boyde v. California*, 494 U.S. 370 (1990). The majority opinion also rests on a new rule in violation of *Teague v. Lane*, 489 U.S. 288 (1989). Accordingly, consideration by the full Court is necessary to maintain uniformity of decisions.

I.

THE MAJORITY OPINION CONFLICTS WITH THE SUPREME COURT'S HOLDING IN *BOYDE*

The majority of the panel in this case finds prejudicial error under the Eighth Amendment based on several instructions given by the trial court regarding the various circumstances the jurors may consider in determining whether Belmontes should receive a sentence of death or life in prison. As the majority notes, this finding ultimately hinges on the sufficiency of California's so-called "unadorned factor (k)" instruction which is, in essence, a "catch-all" mitigation instruction in capital cases.[1] Slip Opinion 9585. The majority opinion recognizes the Supreme Court has previously approved this very instruction

---

[1] The jury here was instructed that, in determining the penalty to be imposed, they were to consider, among other things, "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." *Boyde v. California*, 494 U.S. at 372; California Jury Instructions, Criminal [CALJIC] No. 8.84.1 (4th Ed 1979); Slip Opinion 9570; RT 2494.

in *Boyde v. California*, 494 U.S. 370 (1990). The majority opinion distinguishes *Boyde*, however, by limiting its holding to cases in which the evidence in mitigation is limited to general information about the defendant's "background and character," which is offered to "tend to explain why the defendant committed the crime." Slip Opinion 9578. The majority insists this instruction, while acceptable in *Boyde*, was nonetheless insufficient in this case because it failed to inform the jurors they could consider the proffered evidence of Belmontes' former commitment to the California Youth Authority (CYA) in determining whether he might adjust well to a life in prison. This is so, the majority opines, because the instruction "does not apply to those forward-looking considerations" such as "the defendant's probable future conduct if incarcerated for life without the possibility of parole." Slip Opinion 9575, 9578.

The majority finds this alleged inadequacy of the "unadorned factor (k)" instruction, coupled with some of the trial judges informal answers to juror questions during deliberations, was reasonably likely to have misled the jurors to believe they were forbidden from considering Belmontes' evidence offered to show he "would live a productive life if permanently incarcerated in a structured environment." Slip Opinion 9585.

Appellee submits the majority opinion rests on a fundamental misapplication of *Boyde v. California*, 494 U.S. 370. In *Boyde*, the Supreme Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the same instruction given in Belmontes' case. Boyde argued "that the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to non-crime related mitigating evidence,

because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (original emphasis). The Supreme Court rejected this contention. Considering the instruction "standing alone" the Court held there was not "a reasonable likelihood that the jury applied the instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380-81. The Court explained that, as was true in Belmontes' case, "the jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes consideration of a defendant's background and character." *Id.* at 382 (original emphasis). The *Boyde* Court found, therefore, that California's "catch-all" mitigation instruction was constitutional on its face because it permitted consideration of non-crime related evidence in mitigation. *Id.* at 380-82.

The majority opinion's attempt to distinguish *Boyde* is flawed from the outset because its initial premise is faulty. By its plain terms, *Boyde* is not limited to cases simply involving evidence of a defendant's "background and character," offered to "tend to explain why the defendant committed the crime." Slip Opinion 9578. To the contrary, the *Boyde* Court acknowledged that when the "factor (k)" instruction is considered in light of the other instructions given (which were also all given in this case), reasonable jurors would in fact realize they were to consider all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383.

Moreover, there is nothing in *Boyde* to suggest, as the majority opinion here finds, that the Supreme Court's holding would not apply with equal force to the mitigation evidence offered in this case. As the dissenting judge here found, the evidence supporting Belmontes' argument of

future institutional adjustment consisted solely of testimonials regarding his background and character during his CYA commitment, and "*Boyde* makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k)." Slip Opinion 9592.

Indeed, the Supreme Court's holding in *Skipper v. South Carolina*, 476 U.S. 1 (1986) – upon which the majority opinion also relies – acknowledges that evidence of a defendant's prior incarceration, offered to show a likely future of conformity in prison, is in fact a form of character evidence: "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character. . . . " *Skipper*, at 7. The Supreme Court in *Boyde* also rejected a claim that the "unadorned factor (k)" instruction did not permit the jury to consider, as required by *Skipper*, evidence that Boyde "could lead a useful life behind bars." As in the present case, the basis for asserting that Boyde might conform well to a future life in prison consisted of evidence of his prior accomplishments while incarcerated. The *Boyde* Court noted that, among other things, such evidence "did not pertain to prison behavior *after the crime for which he was sentenced to death*, as was the case in *Skipper*" but, rather, was simply additional evidence of good character which "the jury had the opportunity to conclude through factor (k) . . . extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Boyde*, at 382, n. 5 (emphasis added).

The majority opinion also emphasizes the *Boyde* Court's dictum about "the belief, long held by this society, that defendants who commit criminal acts that are

attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Boyde*, at 382. The majority speculates that society has no such "long held view" about the mitigating effect of a defendant's likely future conduct. "Thus, in the absence of a clear instructions on point, jurors are not likely to be aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor. Slip Opinion 9578-79.

This pronouncement – that absent a clear instruction on the matter, jurors would not otherwise consider a defendant's future prospects for nonviolent institutional adjustment – is (1) at odds with common sense, (2) inconsistent with the Supreme Court's views on the matter, and (3) irrational in light of the record here. Indeed, the Supreme Court in *Skipper* expressly found the consideration of a defendant's prior good behavior in prison, offered as indicative of his character for probable future conduct if sentenced to life in prison, "is an *inevitable* . . . element of criminal sentencing that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 5 (emphasis added).

There is virtually no chance the jury here, composed of presumably intelligent people, would have simply disregarded such an "inevitable" element of its sentencing determination and made an "elusive" distinction that precluded consideration of Belmontes' future adaptability to prison. *Skipper* at 7. This is especially true in light of the record here. As aptly summarized in the dissenting opinion, the jury heard, without objection, several witnesses testify about Belmontes' prior experience in CYA.

Belmontes himself asked the jury for life in prison because in prison "there is an opportunity to achieve goals and try to better yourself." (RT 2470.) He asked the jury to spare his life so he could "try to improve" himself. (RT 2470-71.) Belmontes' counsel then effectively argued that, in light of the evidence of Belmontes' prior CYA commitment, although he could not "make it on the outside," he could "fit[] into the system" and "contribute something" in the future. (RT 2474-79.) Even *the prosecutor* acknowledged that the jury could and *should* consider Belmontes' future prospects of a life in prison in determining the proper punishment: "And I think that value to the community [in the future] is something that you have to weigh in. There's something to that." (RT 2459-60.) Neither the court nor any of the parties or witnesses said anything to suggest the jury could not consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects.

As the dissent here noted, the majority's view that the jury nonetheless felt constrained to reject all such evidence and argument necessitates a finding "that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes' lawyer were not smart enough to realize they were all mistaken." Slip Opinion 9596. As was true in *Boyde*, it is unlikely that reasonable jurors would have believed the court's instructions somehow "transformed all of this 'favorable testimony [and unrebutted argument] into a virtual charade.'" *Boyde*, at 383-84 (quoting *California v. Brown*, 479 U.S. 538, 542 (1987).) The majority's finding to the contrary rests on an artificially restrictive interpretation of *Boyde* and an irrational assessment of the record. It should not stand.

II.

THE MAJORITY OPINION MISAPPLIES THE CONTROLLING STANDARD FOR ASSESSING CONSTITUTIONAL ERROR ENUNCIATED IN *BOYDE*

In assessing whether California's "unadorned factor (k)" instruction violates the Eighth Amendment, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, at 380. In making this determination, the "single instruction . . . may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, at 378.

Given the overall content of the instructions in this case, there is virtually no chance the jurors would have believed they were forbidden from considering the evidence at issue. Assuming *arguendo* the "unadorned factor (k)" instruction was somehow insufficient, the additional instructions clearly informed the jurors they could consider any mitigating factor established by the evidence, including Belmontes' likely future institutional adjustment. In addition to the court's directive that the jurors were to "consider all the evidence" in determining the penalty to be imposed, they were given the following special instruction:

> [T]he mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision

> that death is not the appropriate punishment in this case.

(RT 2496.) The majority concludes this special instruction somehow "exacerbated" the jury's alleged confusion because the second and third sentences of the instruction somehow served to undermine and contradict the plain meaning of the first sentence. Slip Opinion 9580.

Appellee respectfully submits that no reasonable juror could have interpreted the special instruction as the majority insists. The only reasonable reading of the first sentence is that the jury's determination of mitigating factors was not limited to those expressly enumerated. Logically, the jury could have only concluded they could consider other factors not enumerated. Moreover, the only reasonable interpretation of directive to "pay careful attention to each of these factors" and "any one of them standing alone may support a decision that death is not the appropriate punishment" is that the jury should consider *any* mitigating factor it found, *whether expressly listed or not.* Jurors would "naturally" and "inevitably" consider Belmontes' "past conduct as indicative of his proper future behavior." *Boyde*, at 382 fn. 5; *Skipper* at 5.

The majority also finds the trial judge "compounded the problem" with his informal answers to some juror questions during deliberations. Slip Opinion 9580-84. For the reasons discussed, there simply was no "problem" to compound. The jurors were expressly told their consideration of possible mitigating factors was not limited.

In any event, there is no reasonable chance the court's answers to the jurors misled them as the majority concludes. Juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that

was the listing." The court replied, "That was the listing, yes, ma'am." Juror Hern then asked, "Of those certain factors we were to decide one or the other and then balance the sheet?" The court replied, "That is right. It is a balancing process." A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric during this time?" The court responded, "That is something you cannot consider in making your decision." (RT 2501-02.)

Juror Hern's inquiry did not convey a misunderstanding about the factors to be considered in the penalty phase deliberations. Her use of the word "listing" did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically enumerated. Nor did her use of the metaphor, "balance the sheet," convey an unconstitutionally restrictive understanding of the jury's role in penalty phase determinations. Indeed, the court's answer to Juror Hern's question properly characterized the balancing process of penalty phase determinations under California law. See *People v. Bacigalupo*, 6 Cal.4th 457, 470 (1993). Moreover, the court's comment not to consider possible psychiatric treatment in prison was correct because no evidence even remotely relating to the matter had been presented. *People v. Crittenden*, 9 Cal.4th 83, 143-44 (1994); CALJIC 1.03.

Furthermore, immediately before the jurors asked these questions, the court directed them to "go over the instructions again with one another." (RT 2501.) Again, those instructions unambiguously informed the jurors that potential mitigation factors were not limited to those that had been enumerated. The court never said anything to indicate the jurors were limited or in any way restricted

from using any mitigating *evidence* in any way they saw fit.

In *Boyde*, the Court warned that, although there is a strong policy for accurate sentencing determinations in capital cases, "there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, at 380. The High Court has also held that a theoretical or abstract claim of improper jury instructions is insufficient to establish constitutional error. *Cupp v. Naughten,* 414 U.S. 141, 147-49 (1973).

The claimed error here is, at best, speculative and theoretical. As in *Boyde*, the "unadorned factor (k)" instruction here did not preclude the jurors from considering any evidence in mitigation. Like the evidence in *Boyde*, the evidence at issue here related to Belmontes' character, specifically his character for passive conformity in an institutional setting. There is no reason to believe the jury here was misled to disregard such evidence and the reasonable inferences to be drawn therefrom. This is particularly true because, as in *Boyde*, the jury here was expressly told to consider "all the evidence." (RT 2493.) Moreover, any possible confusion on this point was cured by the special instruction, which clearly stated the jury could consider additional mitigating factors beyond those enumerated.

Moreover, as the *Boyde* Court also observed:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process,

> with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde, at 380-81. Appellee respectfully submits the majority's finding of error does in fact rely on "technical hairsplitting" without regard for a commonsense understanding of the overall instructions and without consideration of what actually occurred in the penalty-phase trial. Moreover, the jury would not have made the "elusive" distinction between past conduct and future behavior suggested by the majority. *Skipper* at 6-7.

Again, the jurors here were instructed that they were not limited to any preordained mitigating circumstances and that their finding of any single mitigating circumstance could be sufficient to support a decision that the death penalty was inappropriate. Moreover, the closing statements by both parties made it clear the jury was to consider and weigh all of mitigating evidence, including Belmontes' future prospects in prison. (RT 2452-2462, 2472-2479.)

In sum, the jurors very clearly understood they could consider any evidence in mitigation and give any such evidence whatever weight they felt it deserved. There is virtually no chance, let alone a reasonable likelihood, the jurors interpreted or applied the instructions here to prevent them from considering any relevant evidence in mitigation.

III.

THE MAJORITY OPINION RESTS ON A NEW RULE IN VIOLATION OF *TEAGUE V. LANE*, 489 U.S. 288[2]

Under *Teague*, a defendant may not receive federal habeas relief based on a new rule of federal constitutional law not "dictated by precedent existing when the judgment in question became final."[3] *Stringer v. Black*, 503 U.S. 222, 227-29 (1992); *Butler v. McKellar*, 494 U.S. 407 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Teague v. Lane*, 489 U.S. 288. Even when the asserted basis of a constitutional violation does not rest on a "new rule," habeas relief is still precluded where the prior precedent upon which it relies is applied in a "novel setting." *Stringer*, at 228; *Butler*, at 414-15. "The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if reasonable jurists may disagree." *Graham v. Collins*, 506 U.S. 461, 476 (1993) (quoting *Stringer*, at 238, Souter, J., dissenting).

Belmontes' judgment became final when the Supreme Court denied certiorari of his direct appeal on January 17,

---

[2] Appellee has not previously invoked *Teague* on this issue because the present configuration of Belmontes' claim of instructional error, based on the "unadorned factor (k)" instruction, emerged for the first time in the majority opinion. Belmontes' claim of instructional error on appeal rested solely on the court's answers to Juror Hern's questions during deliberations. Slip Opinion 9577; AOB 93-95.

[3] This rule is subject to two narrow exceptions: (1) where the new rule of law places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe and (2) where the new rule involves a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of criminal proceedings. *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994); *Graham*, 506 U.S. at 478; *Teague*, 489 U.S. at 311. Neither of these exceptions are applicable here.

1989. *Belmontes v. Calderon*, 488 U.S. 1034 (1989); *Caspari*, 510 U.S. at 390. Prior to that time, there was no basis for reasonable jurists to disagree about the claim at issue because *no* controlling precedent had *ever* questioned the federal constitutional sufficiency of California's "unadorned factor (k)" instruction.

After Belmontes' judgment became final, the High Court issued its decision in *Boyde*. Even if *Boyde* were applicable under *Teague*, however, its holding only *reinforces* the reasonableness of the California Court's rejection of this claim. *Boyde* found no reasonable chance that this instruction, even "standing alone," would prevent a jury from considering any constitutionally relevant evidence." *Boyde*, 494 U.S. at 380-81. As discussed, the instruction at issue here did not "stand alone" but rather was accompanied by the special instruction that the mitigating factors were not limited to those expressly enumerated. In light of the record, the majority's opinion rests on, at the least, a "novel" interpretation of *Boyde*.

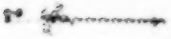
The majority opinion also relies on *Skipper v. South Carolina*, 476 U.S. 1. Unlike *Skipper*, there was no evidence here of the defendant's behavior *after the crime in question*. More importantly, unlike *Skipper*, this case involves no improper exclusion of mitigating evidence. Instead, the present matter merely involves an allegedly ambiguous jury instruction. The majority opinion, therefore, clearly was not dictated by *Skipper* but, rather, applied *Skipper* in an unpredictably "novel" manner. Such an interpretation is barred under *Teague*.

CONCLUSION

For the foregoing reasons, as well as those set forth in the pleadings on file, Appellee respectfully requests that the petition for rehearing be granted and, alternatively, that the Court grant rehearing en banc.

Dated: July 25, 2003

Respectfully submitted,



BILL LOCKYER
Attorney General of the
State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

JO GRAVES
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

MARK A. JOHNSON
Deputy Attorney General

Attorneys for Respondents-Appellees

drb
SA2001XF0003

[Certificate Of Compliance And
Declaration Of Service Omitted In Printing]

No 01-99018

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES,	)
Petitioner and Appellant,	)
vs.	)
JEANNE WOODFORD, WARDEN,	)
Respondent and Appellee.	)

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Eric S. Multhaup
SBN 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
415-821-6000
415-389-0865 fax

Christopher H. Wing
SBN 63214
1101 E Street
Sacramento, CA 95814
916-441-4888
916-441-1575 fax

Attorneys for Appellant
Fernando Belmontes

TOPICAL INDEX

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC 1

I. THE MAJORITY OPINION CORRECTLY APPLIED *BOYDE* V. *CALIFORNIA* IN LIGHT OF THE PARTICULAR EVIDENCE PROFFERED BY APPELLANT AND THE MID-DELIBERATION MIS-INSTRUCTION BY THE TRIAL COURT 2

II. THE MAJORITY OPINION CORRECTLY APPLIED THE CONSTITUTIONALLY MANDATED STANDARD OF REVERSAL 10

III. THE MAJORITY OPINION CONSTITUTES A STRAIGHTFORWARD APPLICATION OF SETTLED UNITED STATES SUPREME COURT LAW 11

CONCLUSION 13

CERTIFICATE OF COMPLIANCE 14

STATEMENT OF RELATED CASES 14

TABLE OF AUTHORITIES

Belmontes v. *Woodford* 335 F.3d 1024 (2003) ..... passim

Bollenbach v. *United States* 326 U.S. 607 (1946) 9

Boyde v. *California* 494 U.S. 370 (1990) ..... passim

Brecht v. *Abrahamson* 507 U.S. 619 (1993) 11

California v. *Brown* 479 U.S. 538 (1987) 12

Eddings v. *Oklahoma* 455 U.S. 104 (1982) 12

Hitchcock v. *Dugger* 481 U.S. 393 (1987) 12

Kelly v. *South Carolina* 534 U.S. 246 (2002) 9

Lockett v. *Ohio* 438 U.S. 486 (1978) 12

Penry v. *Johnson* 532 U.S. 782 (2001)..... 7

Shafer v. *South Carolina* 532 U.S. 36 (2002)..... 9

Skipper v. *South Carolina* 476 U.S. 1 (1986)..... 5

Teague v. *Lane* 498 U.S. 288 (1989) 11

No. 01-99018

Eric S. Multhaup
SBN 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
415-821-6000
415-389-0865 fax

Christopher H. Wing
SBN 63214
1101 E Street
Sacramento, CA 95814
916-441-4888
916-441-1575 fax

Attorneys for Appellant Fernando Belmontes

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES,
Petitioner and Appellant,
vs.
JEANNE WOODFORD, WARDEN,
Respondent and Appellee.

APPELLANT'S RESPONSE TO APPELLEE'S PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Appellant replies to appellee's petition for rehearing and petition for rehearing en banc as follows.

I. THE MAJORITY OPINION CORRECTLY APPLIED *BOYDE* V. *CALIFORNIA* IN LIGHT OF THE PARTICULAR EVIDENCE PROFFERED BY APPELLANT AND THE MID-DELIBERATION MISINSTRUCTION BY THE TRIAL COURT.

Appellee's ringing reaffirmation of *Boyde* v. *California,* 494 U.S. 370 (1990) is in fact a hollow exercise because it ducks any discussion of the mid-deliberation instructions that were most obviously violative of *Boyde* and the Supreme Court jurisprudence underpinning it. Appellee merely notes that "[t]he majority finds this alleged inadequacy of the 'unadorned factor (k)' instruction, *coupled with some of the trial judge*[']*s informal answers to juror questions during deliberations,* was reasonably likely to have misled the jurors to believe they were forbidden from considering Belmontes' evidence offered to show he 'would lead a productive life if permanently incarcerated in a structured environment'." Appellee's Petition for Rehearing ["PFR"], p. 4, emphasis supplied.

Nowhere in the argument does appellee again acknowledge, much less address, the mid-deliberation interchange in which jurors expressed manifest misunderstanding of their role, and in which the trial court affirmatively misled them as to that role. Appellee's failure to address the case-specific application of *Boyde* renders the remainder of his discussion essentially nugatory.

The majority explained its application of *Boyde* in the following manner:

> "We review this claim of instructional error under the approach set forth by the Supreme Court in *Boyde,* which directs us to determine whether there is a reasonable likelihood that the jury understood the instruction in a manner that resulted in its failure to consider constitutionally relevant evidence. 494 U.S. at 380. Although Belmontes' briefs emphasized the trial judge's mid-deliberation colloquy with juror Hern, [footnoted omitted] the Court has held that we must examine claims of instructional error in light of the record as a whole. Id. 377. Accordingly, *in assessing Belmontes' claim of instructional error, we consider the entire mid-deliberation colloquy as well as the original jury instructions.*" *Belmontes* v. *Woodford,* 335 F.3d 1024, 1063-1064 (2003) (emphasis supplied).

The majority then methodically examined the instructions given prior to deliberations, the instructions rejected prior to deliberations, and the instructions given *during* deliberations, before reaching an overall determination as to whether the jury was misled. This approach in no way *conflicts* with *Boyde*; rather, it is a straightforward application of *Boyde.*

In fact, it is *appellee* who takes a quote from *Boyde* out of context and alters its actual meaning in an effort to conjure up a misapplication of *Boyde.* Appellee offered the following incorrect characterization – "The Supreme Court in *Boyde* also rejected a claim that the 'unadorned factor (k)' instruction did not permit the jury to consider, as required by *Skipper,* evidence that *Boyde* 'could lead a useful life behind bars'." PFR, p. 6. The actual passage in

Boyde that contains the uncited quote expressly *distinguished* rather than *rejected* a claim that the factor (k) instruction precluded consideration of evidence that the defendant could lead a "useful life behind bars."

The Supreme Court expressly stated that Boyde had not *offered* his evidence of good prison conduct for the purpose of showing that he could lead a useful life behind bars, but rather to show that he had good character notwithstanding his difficult upbringing:

> "At oral argument (though not in his brief), counsel for petitioner also argued that testimony that Boyde won a prize for his dance choreography while in prison showed that he could lead a useful life behind bars, and that the jury must be able to consider that evidence as a mitigating circumstance under our decision in *Skipper* v. *South Carolina,* 476 U.S. 1 (1986). Factor (k), he argued, did not allow for such consideration. In *Skipper,* we held that a capital defendant must be permitted to introduce in mitigation evidence of post-crime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life in prison rather than death. *The testimony that petitioner had won a dance contest while in prison, however, was introduced not to demonstrate that he was a 'model prisoner' like Skipper and therefore unlikely to present a risk of future danger, but to show that he had artistic ability.* Moreover, although the record is not clear on this point, petitioner apparently won the dance prize during the prison term served *prior* to the Gibson murder, and the evidence thus did not pertain to prison behavior after the crime for which he was sentenced to death, as was the case in *Skipper.* The testimony about dancing ability was presented as a part of

> petitioner's overall strategy to portray him as less culpable than other defendants due to his disadvantaged background and his character strengths in the face of those difficulties. As with other evidence of good character, therefore, the jury had the opportunity to conclude through factor (k) that petitioner's dancing ability extenuated the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." 494 U.S. at 382, fn. 5. (emphasis supplied)

Thus, *Boyde* was very clear that the unadorned factor (k) instruction did *not* necessarily or adequately direct a juror to consider evidence offered for the purpose of showing positive future adjustment and conduct while in prison. *Boyde* explicitly characterized the purpose for which Boyde's in-prison conduct had been offered as something *other* than positive future prison adjustment, in contrast to the evidence offered here. Thus, appellee is simply wrong in its assertion that *Boyde* rejected a claim that unadorned factor (k) instruction did not permit the jury to consider, as required by *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), evidence that a defendant "could lead a useful life behind bars."

On this specific point, the majority's understanding of *Boyde* is clearly correct. The majority took express note of the passage of *Boyde* quoted above from 494 U.S. at 382, fn. 5, and observed that "[a]t the least, the unadorned factor (k) instruction is ambiguous with respect to *Skipper's* requirement that the jury be permitted to consider and give effect to evidence bearing on defendant's probably future good conduct when it decides whether to impose the death penalty, see 476 U.S. at 5, and thus with respect to

the jury's right to consider Belmontes' most important mitigating evidence." 335 F.3d at 1065.

In sum, appellee has unsuccessfully attempted to fudge the *Boyde* decision by suggesting that *Boyde approved* the unadorned factor (k) instruction as a means of informing the jury of the proper consideration to be given to *Skipper* evidence of future good conduct. *Boyde* did no such thing, as the majority correctly recognized. However, that is not the most serious flaw in appellee's argument.

The most serious flaw is the complete failure to address the mid-deliberation colloquy where the trial court's instructions in response to juror questions were specific to the deliberations in this case and flatly violative of *Boyde* and its antecedents. Appellant concurs entirely in the majority's careful assessment of the import of the trial court's mid-deliberation instructions. 335 F.3d at 1065-1068.

There is one case-specific factual point that appellant would like to add to the majority's analysis. Appellee asserts that the instructions were adequate in light of the various factors, including an assertion that "[e]ven *the prosecutor* acknowledged that the jury could and *should* consider Belmontes' future prospects of a life in prison in determining the proper punishment – 'and I think that value to the community [in the future] is something that you have to weigh in. There's something to that' RT 2459-2460." PFR, pp. 8-9, emphasis in original. Appellee further asserts that "[n]either the court nor any of the parties or witnesses said anything to suggest the jury could not consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects." PFR, pp. 8-9 (emphasis in original). Appellee overlooks the

penalty arguments of both the prosecutor and defense counsel. Specifically, appellee overlooks the prosecutor's express statement to the jury that evidence of appellant's religious conversion while incarcerated did *not* fall within any of the enumerated statutory mitigating factors:

> "All right. With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that defendant's religious experience is within the *catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.*
>
> "*I'm not sure it really fits there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration.*" RT 2458, Appellant's Excerpts of Record, No. 13, emphasis supplied.

This passage epitomizes the constitutionally unacceptable "mixed signals" as to the import of the mitigating evidence condemned in, inter alia, *Penry* v. *Johnson*, 532 U.S. 782, 802 (2001) [reversing death sentence because of internally contradictory and unclear instructions regarding sentencing responsibility]. The prosecutor clearly pointed out the anomaly of viewing evidence suggesting good future behavior as somehow "relat[ing] to the defendant at the time he committed the crime, extenuates the gravity of the crime." RT 2458. Thus, the prosecutor focused the jury's attention on the language of factor (k) and the disjuncture between the scope of the instruction and the evidence presented. The jury obviously recognized this disjuncture, as reflected in Juror Hern's questions to the trial court during deliberations.

Defense counsel's argument to the jury also acknowledged the inapplicability of factor (k) to the mitigation

evidence presented – "I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means *and I'm not going to insult you by telling you I think it excuses in any way what happened here,*" because "that is not the reason I asked these people to come in." RT 2473, Appellant's Excerpts of Record, No. 13. Read in a straightforward manner, defense counsel essentially conceded that the mitigating evidence did not excuse or extenuate the gravity of the crime "in any way," and thus did not quality as mitigating evidence of factor (k). The jury must necessarily have been left with at best a confused understanding of whether the evidence of future good conduct was cognizable in the penalty determination, and most likely with an understanding that the future good conduct component of the evidence was *not* contemplated within the permissible range of penalty considerations.

Appellee's failure to address the case-specific aspects of the jury instructions is most apparent in the failure to address the several questions posed by the jury during deliberations. First, as the majority notes, the jury declared a deadlock as to penalty, reflecting how closely balanced the penalty decision was for this jury. Next, Juror Hern attempted to clarify and/or simplify the decision by eliciting confirmation from the trial court that there was a finite list of penalty considerations; and that the jury's responsibility was in effect that of a legal accountant to "balance the sheet." The trial court erroneously confirmed that narrow and unconstitutional characterization of the jury's role. The correct response necessarily entailed an instruction that the jury's responsibility was to give a "reasoned moral response" to the totality of admissible evidence. See *Penry* v. *Johnson,*

supra, 532 U.S. at 788. In sum, respondent's characterization of the mid-deliberation colloquy as "mere informal answers to juror questions" undeserving of consideration flouts the teaching of the United States Supreme Court from *Bollenbach* v. *United States,* 326 U.S. 607 (1946) through *Shafer* v. *South Carolina,* 532 U.S. 36, 53 (2002) [recognizing that a question from a capital jury during deliberation leaves "no doubt about [the jury's failure to gain from . . . the judge's instructions any clear understanding of what a life sentence means"] through *Kelly* v. *South Carolina,* 534 U.S. 246, 256 (2002) [observing that "the jurors' questions in *Simmons* and *Shafer* confirm the inadequacy of the charges in those cases . . . "]. The majority correctly understood and applied *Boyde* to the unusual, if not unique, facts of this case.

II. THE MAJORITY OPINION CORRECTLY APPLIED THE CONSTITUTIONALLY MANDATED STANDARD OF REVERSAL.

Appellee's argument here is a functional reiteration of the first argument regarding the correctness of the instructions. In this section, however, appellee does refer to the mid-deliberation questions from the jurors and responses by the trial court. However, respondent's discussion does not illuminate the issue, in as much as it consists of a series of ipse dixits – "Her [Juror Hern's] use of the word 'listing' did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically enumerated"; "nor did her use of the metaphor, 'balance the sheet,' convey an unconstitutionally restrictive understanding of the jurors' role in penalty phase determinations", all verbatim reiterations from appellee' s brief in this court PFR 12.

Appellee fails to address that portion of Juror Hern's question where she initially obtained confirmation from the trial court that there was a single "listing" of aggravating and mitigating circumstances, followed by a further confirmation in the form of a question, "*of those certain factors* we were to decide one or the other and then balance the sheet?" Emphasis supplied. Appellee simply refuses to acknowledge that Juror Hern's descriptions are consistent *only* with a closed-ended list of factors, *not* with an *open-ended* set of factors that would include evidence of positive future institutional adjustment.

Appellee does not seriously suggest that the majority applied an incorrect legal standard, nor could any such claim be credibly made in view of the majority's careful application of the *Boyde* standard to the effect of the instructions, 335 F.3d at 1065, coupled with its harmless error application of *Brecht* v. *Abrahamson,* 507 U.S. 619 (1993). See 335 F.3d at 1068-1071. Rather, appellee merely asserts that "The claimed error here is, at best, speculative and theoretical," a characterization belied by the record as determined by the majority.

III. THE MAJORITY OPINION CONSTITUTES A STRAIGHTFORWARD APPLICATION OF SETTLED UNITED STATES SUPREME COURT LAW.

Appellee asserts for the first time that the majority's decision is barred by the rule of *Teague* v. *Lane,* 498 U.S. 288 (1989), in its reliance on *Boyde,* supra, which was issued after appellant's state court judgment became final. PFR 17. This is a surprising claim, given that appellee cited and relied on *Boyde* in appellee's brief in this Court as setting forth the correct standard of review on this issue. In any case, the controlling principle governing this

issue was promulgated by the United States Supreme Court long before the state appeal in this case was concluded, inter alia, *Hitchcock* v. *Dugger,* 481 U.S. 393 (1987); *Lockett* v. *Ohio,* 438 U.S. 486 (1978); *Eddings* v. *Oklahoma,* 455 U.S. 104 (1982); and *California* v. *Brown,* 479 U.S. 538 (1987).

Hitchcock v. *Dugger,* supra, vacated a death sentence because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of *Skipper* v. *South Carolina* [citation], *Eddings* v. *Oklahoma* [citation], and *Lockett* v. *Ohio* [citation]." 481 U.S. at 398-399. The Florida statute in question included a phrase that mitigating circumstances "shall be the following," accompanied by a list and noted that "the Florida Legislature has since removed the phrase 'as enumerated [in the statutory list]' from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances." Id. at 397.

The legal predicate of *Hitchcock,* supra, and its antecedents are indisputably applicable to this case, and the factual predicate of an improper restriction to a finite and close-ended list of mitigating factors is functionally indistinguishable. This newly discovered *Teague* argument is without merit. See Appellant's Reply Brief – "Appellant has been arguing . . . since the direct appeal in 1982 [that] this mid-deliberation instruction constituted an Eighth Amendment violation under controlling authority of the United States Supreme Court, including *Hitchcock* v. *Dugger,* 481 U.S. 393 (1987)." Appellant's Reply Brief, p. 44. The fact that the majority and dissenting opinions in this case spent considerable time discussing *Boyde* v.

California, supra, in no way impugns the preexisting and settled law of the United States Supreme Court regarding consideration of mitigating evidence that dictated the result in this case.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court deny the Petition for Rehearing and Petition for Rehearing En Banc.

Dated: September 8, 2003

Respectfully submitted,

/s/ [Illegible]
ERIC MULTHAUP

CHRISTOPHER H. WING

Attorneys for Petitioner and Appellant,
FERNANDO BELMONTES

[Certificate Of Compliance, Statement Of Related Cases And Declaration Of Service Omitted In Printing]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, JR., Petitioner-Appellant, v. JILL L. BROWN, Warden, for the California State Prison at San Quentin, Respondent-Appellee.	No. 01-99018 D.C. No. CV-89-00736-DFL Eastern District of California, Sacramento ORDER (Filed Aug. 2, 2005)

Before: REINHARDT, Circuit Judges.

The parties shall file, within 21 days of the date of this order, briefs not exceeding 15 pages in length (50 copies each) setting forth their respective positions on whether the case should be reheard en banc.

01-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, JR., Petitioner-Appellant, **v.** **JILL L. BROWN, Warden for the California State Prison at San Quentin** Respondent-Appellee.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Eastern District of California
No. CIV S-89-00736 DFL
David F. Levi, Judge

APPELLEE'S BRIEF RE: HEARING EN BANC

BILL LOCKYER
Attorney General of the State of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
JOHN G. McLEAN
Supervising Deputy Attorney General
MARK A. JOHNSON
Deputy Attorney General
State Bar No. 179141
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960
Attorneys for Respondent-Appellee

TABLE OF CONTENTS

	Page
A. Procedural Background Following The Submission Of The Appeal	1
B. Appellee Welcomes The Opportunity To Have This Court Review This Case En Banc	3
CONCLUSION	13

01-99018

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, JR., Petitioner-Appellant, **v.** **JILL L. BROWN, Warden for the California State Prison at San Quentin** Respondent-Appellee.	**CAPITAL CASE**

Appellee John Stokes[1] hereby submits the following pursuant to Circuit Rule 35-2 and in response to this Court's August 2, 2005, order for briefing:

[1] John Stokes has recently replaced Jill Brown as acting warden of San Quentin State Prison. Mr. Stokes should be substituted as Respondent-Appellee in this matter.

A. Procedural Background Following The Submission Of The Appeal

On July 15, 2003, a panel majority of this Court issued an opinion reversing the penalty phase judgment in this case on the grounds of alleged instructional error. *See Belmontes v. Woodford,* 335 F.3d 1024 (9th Cir. 2003).[2] Appellee submitted a timely petition for rehearing and suggestion for rehearing en banc. In an order issued on February 5, 2004, the panel denied rehearing, and a majority of the full court rejected the petition for rehearing en banc. *See Belmontes v. Woodford,* 359 F.3d 1079 (9th Cir. 2004).

Thereafter, Appellee filed a petition for writ of certiorari in the United States Supreme Court. On March 28, 2005, the High Court granted certiorari, vacated the judgment, and remanded the matter to this Court for further consideration in light of *Brown v. Payton,* 544 U.S. ___, 125 S.Ct. 1432 (2005). *See Brown v. Belmontes,* ___ U.S. ___, 125 S.Ct. 1697 (2005).

Following remand, the same panel majority issued another opinion on July 15, 2005. The new decision reversed the penalty phase judgment for the same reasons set forth in the previous decision. The panel majority found that *Payton* did not affect the outcome here because *Payton* was governed by the AEDPA (*see* 28 U.S.C. § 2254), and *Belmontes* is not.

---

[2] The opinion was superseded with no substantive changes on November 20, 2003. *See Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003).

On August 2, 2005, this Court ordered the parties to submit briefing setting forth their respective positions on whether the case should be reheard en banc.

B. Appellee Welcomes The Opportunity To Have This Court Review This Case En Banc

As noted above, Appellee previously sought rehearing and rehearing en banc immediately after the panel issued its first decision in this case. These requests were denied nearly seven months later. After the Supreme Court reversed the earlier decision and remanded the case for reconsideration, the panel again ordered federal habeas relief for the same reasons set forth in the earlier decision. In an effort to avoid any further delay, Appellee opted not to file another petition for en banc review. Instead, Appellee obtained a 90-day stay on the issuance of the mandate in order to file another petition for writ of certiorari in the United States Supreme Court.

Appellee is now precluded from requesting en banc rehearing because the time for filing such a petition expired on July 29, 2005 – 14 days after the entry of judgment. *See* Fed.R.App.Proc., rules 35(c), 40(1). However, this Court retains the option of ordering en banc review sua sponte. Fed. R. App. Proc., rule 35(a); Circuit Rule 35-2. Respondent respectfully submits that such an order should issue in this case.

The panel majority's order for habeas relief in this case turns on the finding that California's so-called "unadorned factor (k)" instruction, previously given in capital cases, violated the Eight Amendment in this case. In this regard, the majority found that the instruction was constitutionally insufficient to inform the jurors that they could

consider "forward-looking" evidence of Appellant's future prospects as a life prisoner in determining whether death was the appropriate punishment. As explained fully in Appellee's previous petition for rehearing en banc, this finding is inconsistent with the United States Supreme Court's decision in *Boyde v. California,* 494 U.S. 370 (1990), violates the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), and is irreconcilable with the facts of this case. In the interest of economy, Appellee hereby incorporates as though fully set forth the reasoning advanced in support of the earlier petition for rehearing en banc. For this Court's convenience, a copy of the previous petition is appended to this brief.

Indeed, the United States Supreme Court's recent decision in *Payton* further confirms the sufficiency of the "unadorned factor (k)" instruction in this case. Although *Payton* was decided under the AEDPA, the High Court nonetheless found that, as a general matter, jurors would understand the factor (k) as encompassing evidence bearing on a defendant's character after the crime:

> After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.

(*Payton*, at 1439.) This reasoning applies with equal force to the "forward-looking" evidence presented in Appellant's case. Background and character evidence, offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, would be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Indeed, such a "forward-looking inquiry *is not independent of an assessment of moral culpability*." *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (emphasis added) (*see also Skipper v. South Carolina*, 476 U.S. 1, 7 (1986) ["a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character. . . ."].)

In addition to the various reasons set forth in *Payton* and in Appellee's previous petition, Appellee also submits that en banc review is appropriate in this case because Appellant has *never before* raised *any* claim about the factor (k) instruction giving insufficient guidance with respect to "forward-looking" evidence of institutional adjustment or good future prospects. Appellant's sole claim regarding the factor (k) instruction in the California courts was that it provided insufficient guidance "on the proper role of sympathy and general character and background evidence." *People v. Belmontes*, 45 Cal.3d 744, 799 (1988).[3] Petitioner never complained that the instruction was insufficient with respect to "forward-looking" evidence of his future prospects. Because Appellant never presented the state courts with either the factual or legal basis of this present claim of instructional error, the claim is

[3] This is the precise claim that the Supreme Court subsequently addressed and expressly rejected in *Boyde v. California*, 494 U.S. at 380-382.

unexhausted and, therefore, cannot provide grounds for federal habeas relief *Duncan v. Henry,* 513 U.S. 364, 365 (1995) (per curiam); *Gray v. Netherland,* 518 U.S. 152, 163 (1996).

Moreover, at no time during the many years of federal habeas litigation did Appellant ever claim that the factor (k) instruction was insufficient with respect to "forward-looking" evidence. Because Appellant did not raise any such claim before the district court, he may not obtain relief on this claim now. *See Park v. California,* 202 F.3d 1146, 1155 (9th Cir. 2000) (refusing to consider claims not properly raised in the habeas petition before the district court).

Nor did Appellant *ever* seek to raise any complaint concerning the factor (k) instruction on appeal to this Court.[4] Because the scope of appellate re habeas cases is limited to issues specified in the certificate of appealability (*see* 28 U.S.C. § 2253(c)), Appellant may not obtain relief on this issue for which he has never sought appellate review.[5] *See Hiivala v. Wood,* 195 F.3d 1098, 1102-1103

---

[4] For this reason, Appellee had no reason, and had no opportunity, to address anything concerning the constitutional viability of the factor (k) instruction in the original Appellee's brief. However, in Appellee's previous petition for rehearing and suggestion for rehearing en banc, Appellee did raise the matter of Appellant's failure to raise any previous challenge to the instruction. Appellee also brought this matter to the high court's attention in the previous petition for writ of certiorari.

[5] Indeed, Appellant's *first mention* of the factor (k) instruction came in his reply brief. This was in connection with a claim that *dealt exclusively* with the trial court's allegedly improper answers to some of the jurors' informal inquiries during penalty phase deliberations. (*See* Appellant's Reply Brief, pp. 44-51.) Even assuming that Appellant is somehow deemed to have challenged the factor (k) instruction by merely *mentioning* it in the reply brief, any such claim would be

(Continued on following page)

(9th Cir. 1999) (per curium) (concluding that a court of appeals' review is limited to issues specified in the COA). This rule applies to all habeas appeals filed after the effective date of the AEDPA, regardless of when the underlying habeas petition was filed.[6] *Slack v. McDaniel*, 529 U.S. 473, 481-482 (2000) (*see also Lambright v. Stewart*, 220 F.3d 1022, 1024 (9th Cir. 2000); *Nevius v. McDaniel*, 218 F.3d 940, 942 (9th Cir. 2000)).

For these reasons, Appellee respectfully submits that this Court should conduct en banc review in this case. Appellee further submits that such review should encompass *all* of the outstanding issues on appeal. Such review is not only appropriate, but is necessary, in order to achieve a timely final resolution in this matter and to avoid the substantial delay and expense associated with further piecemeal litigation.

Indeed, the delay occasioned by the federal habeas proceedings in this case has already been profound. Appellant committed the murder for which he now stands convicted in March 1981. A judgment of death was officially entered in October 1982. Appellant's judgment and sentence of death were affirmed by the California Supreme Court on June 23, 1988 (*People v. Belmontes*, 45 Cal.3d 744), and the judgment became final on January 17, 1989, after the Supreme Court denied his request for certiorari. *Belmontes v. Calderon*, 488 U.S. 1044 (1989).

---

waived. *Bazuaye v. INS*, 79 F.3d 118, 120 (9th Cir. 1996) (per curiam); *Eberle v. City of Anaheim*, 901 F.2d 814, 818 (9th Cir. 1990).

[6] This appeal was filed many years after the 1996 effective date of the AEDPA. *See Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059, 2063 (1997).

Appellant filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of California in May 1989. Appellant simultaneously requested and received permission to stay federal habeas proceedings while he sought to exhaust his state court remedies for various new claims. Over the next several years, Appellant obtained many more stays and time extensions while he endeavored to raise and exhaust even more new claims. During these years, Appellant did little more than present "bare bones" allegations, accompanied with superficial assertions of constitutional error, to the various state courts. Although these perfunctory efforts were wholly insufficient to perfect Appellant's various claims for federal habeas review (*Rose v. Lundy,* 455 U.S. 509 (1982); *Keeney v. Tamayo-Reyes,* 504 U.S. 1 (1992)), Appellee was nonetheless permitted to proceed with these claims, despite Appellee's repeated objections.

Appellant filed an amended habeas petition in the district court on November 4, 1994 – over five years after the original petition was filed. The parties thoroughly litigated all of Appellant's numerous claims for many years thereafter. During this period, the district court gave Appellant virtual carte blanche leave to conduct broad-sweeping discovery in order to substantiate, augment, or amend his claims in any manner he saw fit. Although Appellant raised literally dozens of claims, he always placed the main emphasis of the litigation on his claim of ineffective assistance of counsel in his penalty phase trial. Nearly twelve years after Appellant filed his original petition, and over six and a half years after he filed his amended petition, the district court issued a final judgment denying habeas relief on May 14, 2001.

Appellant then sought review in this Court. The parties submitted their respective briefs by August 2002, over a year after the habeas petition had been denied. On December 5, 2002, the three-judge panel heard well over two hours of oral argument, and the case was submitted for a final decision as to all claims. As was true in the district court, the issue of alleged ineffective assistance of counsel in the penalty phase predominated the appellate briefs and the oral argument.

Over seven months later, the panel issued its initial opinion. Because a majority of the panel found reversible error based on the previously-unmentioned issue of the factor (k) instruction, they did not reach the primary claim of ineffective assistance in the penalty phase trial.[7]

Nearly seven more months passed before this Court denied Appellee's petition for rehearing and suggestion for rehearing en banc. Thereafter, over another year elapsed until the Supreme Court granted Appellee's petition for certiorari, reversed the judgment, and remanded the matter for further consideration. On remand, the same panel majority has again found the "unadorned factor (k)" instruction to be constitutionally infirm. Consequently, the panel majority has again left the claim of ineffective assistance unresolved.[8]

If this Court opts to undertake en banc review in this case, but nonetheless limits the review to the issue of the "unadorned factor (k)," the losing party will unquestionably

---

[7] Justice O'Scannlain did address this claim in his dissenting opinion and found the claim to be without merit.

[8] Again, Justice O'Scannlain addressed this claim in dissent and found it to be meritless.

seek certiorari in the Supreme Court.[9] In the event Appellee were ultimately to prevail on this issue, the case would again be returned to the panel for further review of the remaining claims. Even if the panel were to reach a resolution of *all* the remaining issues at that point[10], the losing party would then, without question, once again seek en banc rehearing before this Court, or petition for certiorari before the Supreme Court, or both.

The issues in this case have all been submitted for decision for approaching three years. Neither of the parties to this action have any judicially-cognizable interest in engaging in any further protracted appellate litigation.

---

[9] Indeed, this Court should be aware that Appellee will be filing a petition for certiorari on this issue within the next few weeks. Immediately after the panel issued its most recent judgment, Appellee obtained a 90-day stay of mandate to allow Appellee to file a certiorari petition. Because Appellee opted not to file another petition for rehearing following this latest panel opinion, nothing has occurred in this case to toll the time for filing a petition for certiorari within the 90-day period set forth in Supreme Court Rule 13. As noted above, the time has now passed for Appellee to toll this period by filing a timely request for en banc rehearing. Accordingly, Appellee must now file a timely petition for writ of certiorari to avoid the prospect of forever relinquishing the right to seek such review. In the event that this Court orders en banc review in this case, Appellee will, of course, notify the Supreme Court immediately and ask the High Court to withhold consideration of Appellee's certiorari petition pending the outcome of the en banc panel's decision.

[10] Although the issue of trial counsel's alleged incompetence in the penalty phase trial is the only remaining claim of any substance, still pending are three perfunctory claims involving: (1) allowing evidence of prior unadjudicated criminal acts in the penalty phase trial (AOB 95); (2) allegedly improper responses to jurors' questions about the possible consequences of a hung jury in the penalty phase (AOB 99); and (3) alleged error resulting from a letter from the trial judge sent to the jurors following the penalty phase verdict. (AOB 100.)

Accordingly, Appellee welcomes the opportunity to resolve this case via en banc review as an alternative to seeking certiorari. The interests of efficient judicial administration, economy, and fundamental fairness all counsel strongly in favor of en banc review to address all pending issues in order to arrive at a final resolution of this habeas corpus appeal. To do otherwise would quite likely entail several more years of costly litigation, heaping even more weight onto this already heavily-burdened case, and would likely siphon a great deal more from the already shallow reservoir of scarce federal and state judicial resources.

CONCLUSION

For the reasons set forth above, Appellee respectfully submits that this case is appropriate for en banc review. In the event that this Court orders en banc review, Appellee urges that such review should encompass all of the pending issues in this case in order to arrive at a long-awaited resolution of this habeas corpus appeal.

Dated: August 22, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

MARY JO GRAVES
Senior Assistant Attorney General

WARD A. CAMPBELL
Supervising Deputy Attorney General

JOHN G. McLEAN
Supervising Deputy Attorney General
MARK A. JOHNSON
Deputy Attorney General
Attorneys for Respondent-Appellee

No. 01-99018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner and Appellant, v. JILL BROWN, Warden, Respondent and Appellee.	)	DC No. CV-89-0736-DFL

APPELLANT'S BRIEF REGARDING REHEARING EN BANC

[Death Penalty Case]

ERIC S. MULTHAUP
SBN 62217
20 Sunnyside Avenue, Ste. A
Mill Valley, CA 94941
(415) 821-6000

CHRISTOPHER H. WING
SBN 63214
1101 E Street
Sacramento, CA 95814
(916) 441-4888

Attorneys for Appellant
Fernando Belmontes

TOPICAL INDEX

PROCEDURAL POSTURE 1

STANDARD FOR GRANTING REHEARING EN BANC 2

APPLICATION OF THE RULE 35 STANDARD TO THIS CASE 2

A. Prior Denial of Rehearing En Banc on the Merits is a Sufficient Basis to Refuse Rehearing En Banc on the Merits Now 3

B. The Demonstrable Difference in the Standards of Review Applicable to this Case vs. Payton. 5

C. The Absence of Any Need for Rehearing En Banc to Maintain Decisional Uniformity or to Resolve a Question of "Exceptional Importance" 5

CONCLUSION 8

CERTIFICATE OF COMPLIANCE 8

TABLE OF AUTHORITIES

Cases

Belmontes v. Woodford [*Belmontes I*] 2
350 F.3d 861 (9th Cir. 2003)

Belmontes v. Brown [*Belmontes II*] 2
414 F.3d 1094 (9th Cir. 2005)

Boyde v. California 7
494 U.S. 370 (1990)

Brown v. Payton ..... passim
544 U.S. ___, 125 S.Ct. 1432 (2005)

Harris v. Vasquez 6
949 F.2d 1497, 1545 (9th Cir. 1990)

In re Murchison 4
349 U.S. 133 (1955)

Moody v. Albemarle Paper Co. 7
417 U.S. 622, 626 (1974)

United States v. Alpine Land & Reservoir Co. 3
291 F.3d 1062 (9th Cir. 2002)

United States v. American-Foreign S.S. Corp. 7
363 U.S. 685, 690 (1960)

United States v. Arnpriester 4
37 F.3d 466 (9th Cir. 1994)

Statutes and Rules

Rule 35, F.R.A.P. ..... passim

Rule 40, F.R.A.P. 2

Cal. Penal Code section 190.3 4

No. 01-99018

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FERNANDO BELMONTES, Petitioner and Appellant, v. JILL BROWN, Warden, San Quentin State Prison, Respondent and Appellee.	DC No. CV-89-0736-DFL

APPELLANT'S BRIEF
REGARDING REHEARING EN BANC

Appellant Fernando Belmontes, through his attorneys Eric S. Multhaup and Christopher H. Wing, submits this brief in response to this Court's Order of August 2, 2005, directing the parties to set forth their positions on whether the case should be heard en banc.

PROCEDURAL POSTURE

Following the remand by the United States Supreme Court with directions that this court reconsider its opinion of July 15, 2003, in light of *Brown v. Payton*, 544 U.S. ___, 125 S.Ct. 1432 (2005), this Court filed a revised opinion on

July 15, 2005, *Belmontes v. Brown*, 414 F.3d 1094. Appellee sought and obtained a stay of the issuance of mandate for a period of 90 days to decide whether the petition for certiorari. Appellee did not file a petition for rehearing of the panel decision pursuant to Rule 40, F.R.A.P., nor any petition for rehearing en banc pursuant to Rule 35, F.R.A.P. Appellee *did* petition for rehearing en banc from the prior 2003 decision of the panel, and that petition was denied on February 5, 2004.

STANDARD FOR GRANTING REHEARING EN BANC

Rule 35(a) provides in pertinent part:

An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

APPLICATION OF THE RULE 35 STANDARD TO THIS CASE

The panel opinion of July 15, 2005, consists of two parts. The first is entitled "Preamble", and discusses whether the *Payton* decision has any effect upon the prior opinion of July 15, 2003, *Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003). The panel concluded that "[h]aving reviewed *Payton*, and our previous independent determination of the constitutional question at issue, we find no

reason to change our judgment on the matter", and reaffirmed the prior opinion. *Belmontes v. Brown*, supra.

A. The Prior Denial of Rehearing En Banc on the Merits is a Sufficient Basis to Refuse Rehearing En Banc on the Merits Now.

The second portion of the opinion from the Introduction through the Conclusion consists of a reiteration and reaffirmation of the prior opinion. Under settled Ninth Circuit law, the second portion of the opinion related to the merits of petitioner's habeas corpus claims is *not* a proper basis for en banc hearing because this Court has already *denied* hearing en banc as to those issues.

United States v. Alpine Land & Reservoir Co., 291 F.3d 1062, 1073 (9th Cir. 2002) denied a petition for rehearing en banc in large part because the identical issue on which rehearing was sought had *previously* been the subject of a denial of rehearing en banc in an earlier appeal in the same case:

> [W]e deny Whitehead's petition. *A petition for rehearing en banc on the identical issue has already been rejected in Alpine III*. See Orr Water Ditch, 256 F.3d at 944. Moreover, this issue does not meet the Ninth Circuit's criteria for rehearing en banc – its resolution is not necessary to secure uniformity of decisions or to decide a question of exceptional importance. See United States v. Burdeau, 180 F.3d 1091, 1092 (9th Cir. 1999) (Tashima, J., concurring). To the contrary, the only opinions addressing this issue uniformly hold that 1902 is not the relevant initiation date for forfeiture purposes. *Although the water rights issues presented are clearly significant, this court has already held that they were not exceptional*

enough to warrant en banc review. Id. at 1073 (emphasis supplied).

The same considerations militate against an en banc rehearing in this case. The issues regarding the impact of the general CALJIC jury instruction that defines mitigation under Cal. Penal Code section 190.3(k) ["Factor [k]"] and of the specific mid-deliberation instructions in response to juror questions were fully raised in the petition for rehearing in *Belmontes I*. This Court's prior denial of the petition for rehearing en banc militates against hearing en banc now for the same reasons relied on in *Alpine Land*, supra.[1]

Judge O'Scannlain's dissent is virtually verbatim identical with his dissent in *Belmontes I*, differing only in the inclusion of citations to *Payton*, supra, without any change in the analysis. Thus, there are no new grounds for reaching a different result as to the propriety of hearing en banc, unless *Payton* significantly changed the standard of review applicable to this pre-A.E.D.P.A case. It did not by its own terms, see *Payton*, supra, 125 S.Ct. at 1442, as discussed below in Part B.

---

[1] It should be noted that Judge Callahan wrote an opinion dissenting from the order denying hearing en banc in which seven other judges joined. Counsel of appellant believes that it is inappropriate for Judge Callahan to participate in any deliberations or voting on this case, because she was employed as a Deputy District Attorney in San Joaquin at all times while the trial prosecution was pending. This type of prosecutorial employment is generally recognized as a ground for recusal of the former prosecutor from sitting as a judge in the same case. See *In re Murchison*, 349 U.S. 133 (1955); *United States v. Arnpriester*, 37 F.3d 466 (9th Cir. 1994). Appellant therefore objects to any further participation in this case by Judge Callahan.

B. The Demonstrable Difference in the Standards of Review Applicable to this Case vs. *Payton*.

The issue on which certiorari was granted in *Payton* was "whether the Ninth Circuit's decision was contrary to the limits on federal habeas review imposed by 28 U.S.C. § 2254(d)", 125 S.Ct. 1435, and the narrow holding of the Supreme Court was that "[e]ven were we to assume the "'relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" Lockyer v. Andrade, 538 U.S. 63, 76, 155 L. Ed. 2d 144, 123 S. Ct. 1166 (2003) (quoting Williams v. Taylor, 529 U.S., at 411, 146 L. Ed. 2d 389, 120 S. Ct. 1495), there is no basis for further concluding that the application of our precedents was 'objectively unreasonable.'" 145 S.Ct. at 1442. Nothing in that holding calls for further consideration of whether the state court decision incorrectly applied federal constitutional law, and therefore nothing in that holding provides a basis for an en banc hearing at this time

C. The Absence of Any Need for Rehearing En Banc to Maintain Decisional Uniformity or to Resolve a Question of "Exceptional Importance".

The panel decision in this case turns on a fact-specific combination of circumstances, consisting of (1) an unusual profile of mitigating evidence presented on petitioner's behalf at trial; (2) the impact of a now-discarded pattern jury instruction; and (3) the idiosyncratic impact of a case-specific mid-deliberation interchange between the trial judge and the jury. This combination of circumstances if virtually guaranteed *not* to recur, because the pattern instruction is defunct and the mid-deliberation instructional interchange is idiosyncratic to this case. There is very little basis for viewing the issue decided here as one

of "exceptional importance" given that it is so case- and fact-specific, and so *un*likely to recur.

The very uniqueness of the factual circumstances underlying the legal resolution of the claim further explains why there is no need for a hearing en banc to "maintain uniformity of the court's decisions", the other criterion for an en banc hearing, *Payton* is the only case that has reasonably related issue, which have been resolved by the United States Supreme Court, there is no other decision within this Court's jurisprudence that colorably conflicts with the panel's resolution.

While this is a capital appeal, the mere fact that an issue arises in a death penalty case does not necessarily and by itself confer "exceptional importance" on the issue. While some individual judges have expressed the view that a substantial issue in a capital appeal qualifies as a question of exceptional importance, see e.g., *Harris v. Vasquez*, 949 F.2d 1497, 1545 (9th Cir. 1990) (Reinhardt, J., dissenting from denial of order denying rehearing en banc), that position has not been adopted by this circuit, or by any other Circuit.

Rather, as the Supreme Court has observed, the en banc procedure was devised by Congress to permit "the wise use of this exceptional power to 'determine the major doctrinal trends of the future' for a particular circuit". *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974), quoting from *United States v. American-Foreign S.S. Corp.*, 363 U.S. 685, 690 ( ). The questions presented in this case have virtually no potential to "determine the major doctrinal trends of the future", because they must be decided under a standard of review from the past, now superseded by the A.E.D.P.A.. The A.E.D.P.A. cases such

as *Payton* have potential to determine major doctrinal trends, but this case does not.

The dissenting opinion of Judge O'Scannlain speaks at length against the correctness of the panel decision as it applied the Supreme Court precedents of *Boyde v. California*, 494 U.S. 370 (1990) and *Brown v. Payton*, supra, to the facts of this case. However, there is nothing in the dissent that suggests that rehearing en banc is necessary to "determine [any] major doctrinal trends of the future". Rather, the dissent is premised on the view that the major doctrinal issues have been *settled* by the Supreme Court, but that the panel majority failed to correctly apply those settled precedents. By its own terms, the dissenting opinion provides no basis for rehearing en banc under the standards of Rule 35.

CONCLUSION

Wherefore, for the foregoing reasons, appellant urges this Court not to order a rehearing en banc.

DATED: August 23, 2005

Respectfully submitted

ERIC S. MULTHAUP

CHRISTOPHER H. WING
Attorneys for appellant
Fernando Belmontes

No. 05-493

Supreme Court, U.S.
FILED
JUN 1 0 2003
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
DONALD E. DE NICOLA
Deputy Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
MARK A. JOHNSON
Assistant Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-5437
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

CAPITAL CASE

In *Boyde* v. *California*, 494 U.S. 370 (1990), this Court upheld the constitutionality of California's "catch-all" mitigation instruction in capital cases, the so-called "unadorned factor (k)," which directs juries to consider "any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." This Court found jurors would reasonably understand this instruction to encompass mitigating factors unrelated to the crime itself, such as the defendant's background and character.

In this case, the Ninth Circuit Court of Appeals held that the use of this same instruction violated the Eighth Amendment of the United States Constitution because it likely misled the jurors to believe they were forbidden from considering background and character evidence relating to "forward-looking" considerations about the defendant's future prospects if sentenced to life in prison.

The questions presented are:

1. Does *Boyde* confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2. Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a "new rule" under *Teague* v. *Lane*, 489 U.S. 288 (1989)?

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES 2

STATEMENT OF THE CASE 2

Belmontes' Murder of Steacy McConnell 2

The State Court Trial and Appeal 3

Federal Proceedings 8

SUMMARY OF ARGUMENT 14

ARGUMENT 18

I. THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE* 18

A. *Boyde* Establishes That California's Factor (k) Instruction Permits Consideration Of Any Relevant "Good Character" Evidence Offered In Mitigation 19

B. The Ninth Circuit's Artificial Parsing Of Good Character Evidence Into "General Character" And "Forward-Looking" Evidence Is Inconsistent With *Boyde* And This Court's Other Eighth Amendment Jurisprudence 21

TABLE OF CONTENTS – Continued

Page

C. Even If "General Good Character" Were Distinguishable From "Forward-Looking Good Character," The Instructions On Mitigating Evidence Given In This Case Did Not Preclude Consideration Of Any "Forward-Looking" Evidence Offered In Mitigation 21

D. The Ninth Circuit's Finding Of An Eighth Amendment Violation In This Case Cannot Be Reconciled With The Controlling *Boyde* Standard For Assessing Ambiguous Instructions 34

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989) 41

CONCLUSION 48

TABLE OF AUTHORITIES

Page

CASES

Belmontes v. *California*, 488 U.S. 1034 (1989) 8, 42

Belmontes v. *Woodford*, 350 F.3d 861 (9th Cir. 2003) 1

Belmontes v. *Woodford*, 359 F.3d 1079 (9th Cir. 2004) 1

Blystone v. *Pennsylvania*, 494 U.S. 299 (1990) 33

Boyde v. *California*, 494 U.S. 370 (1990) ..... *passim*

Brown v. *Belmontes*, 125 S.Ct 1697, 161 L.Ed.2d 518 (2005) 1, 13

Brown v. *Payton*, 544 U.S. 133 (2005) ..... *passim*

Buchanan v. *Angelone*, 522 U.S. 269 (1998) 32, 39

Butler v. *McKellar*, 494 U.S. 407 (1990) 42, 47

California v. *Brown*, 479 U.S. 538 (1987) 31

Cupp v. *Naughten*, 414 U.S. 141 (1973) 32, 39

Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 22, 43, 45

Graham v. *Collins*, 506 U.S. 461 (1993) 42, 45, 46

Hitchcock v. *Dugger*, 481 U.S. 393 (1987) 43

Hughes v. *Borg*, 898 F.2d 695 (9th Cir. 1990) 38

Johnson v. *Texas*, 509 U.S. 350 (1993) ... 26, 29, 31, 32, 33, 44

Jurek v. *Texas*, 428 U.S. 262 (1976) 30

Lambrix v. *Singletary*, 520 U.S. 518 (1997) 46

Lockett v. *Ohio*, 438 U.S. 586 (1978) ..... *passim*

McKoy v. *North Carolina*, 494 U.S. 433 (1990) 44

O'Dell v. *Netherland*, 521 U.S. 151 (1997) 45, 47

Penry v. *Lynaugh*, 492 U.S. 302 (1989) 22, 33

TABLE OF AUTHORITIES – Continued

Page

People v. *Bacigalupo*, 6 Cal.4th 457 (1993) 37

People v. *Belmontes*, 45 Cal.3d 744 (1988) 1

People v. *Crittenden*, 9 Cal.4th 83 (1994) 38

People v. *Frierson*, 25 Cal.3d 142 (1979) 44

Saffle v. *Parks*, 494 U.S. 484 (1990) 45, 47

Sawyer v. *Smith*, 497 U.S. 227 (1990) 47

Simmons v. *South Carolina*, 512 U.S. 154 (1994) 46

Skipper v. *South Carolina*, 476 U.S. 1 (1986) .....*passim*

Stringer v. *Black*, 503 U.S. 222 (1992) 42

Teague v. *Lane*, 489 U.S. 288 (1989) .....*passim*

Tennard v. *Dretke*, 542 U.S. 274 (2004) 26

Tuilaepa v. *California*, 512 U.S. 967 (1994) 6

TXO Production Corp. v. *Alliance Resources Corp.* 509 U.S. 443 (1993) 38

Weeks v. *Angelone*, 528 U.S. 225 (2000) 38

CONSTITUTIONAL PROVISIONS

United States Constitution Eighth Amendment .....*passim*

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2254 12

California Penal Code, § 190.2(a) 3

California Penal Code, § 190.3 ..... 2, 3

TABLE OF AUTHORITIES – Continued

Page

COURT RULES

Federal Rules of Appellate Procedure, rule 35(c) 14

Federal Rules of Appellate Procedure, rule 40(1)..... 14

OTHER AUTHORITIES

California Jury Instructions, Criminal (CALJIC) No. 1.03..... 38

California Jury Instructions, Criminal (4th ed. 1979) CALJIC No. 8.84.1..... 6, 32, 33

Webster's Unabridged Dictionary (2nd ed. 1979)..... 28

PETITIONER'S BRIEF ON THE MERITS

Robert Ayers[1], Acting Warden of California State Prison at San Quentin (the State) respectfully submits petitioner's brief on the merits.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals following remand by this Court is reported as *Belmontes* v. *Brown*, 414 F.3d 1094 (9th Cir. 2005) (*Belmontes II*). Pet. App. (P.A.) at 230a-320a. This Court's prior order granting certiorari and remanding to the Ninth Circuit is reported as *Brown* v. *Belmontes*, 125 S.Ct 1697, 161 L.Ed.2d 518 (2005). The opinion of the Ninth Circuit preceding remand by this Court is reported as *Belmontes* v. *Woodford*, 359 F.3d 1079 (9th Cir. 2004) (*Belmontes I*). P.A. at 1a-84a. The order of the District Court is unreported. P.A. at 101a-146a.

The opinion of the Supreme Court of California on direct appeal is reported as *People* v. *Belmontes*, 45 Cal.3d 744, 755; P.2d 310; 248 Cal.Rptr.2d 126 (1988), *cert. denied*, 488 U.S. 1034 (1989). P.A. at 147a-229a.

STATEMENT OF JURISDICTION

A panel of the Ninth Circuit entered judgment granting habeas corpus relief on July 15, 2005. The State filed a

[1] Steven Ornoski is no longer warden of San Quentin State Prison. The acting warden is now Robert Ayers.

petition for writ of certiorari on October 12, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTES

The Eighth Amendment of the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

California Penal Code section 190.3 provides in pertinent part:

> In determining the penalty, the trier of fact shall take into account any of the following factors if relevant:
>
> . . . .
>
> (k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

STATEMENT OF THE CASE

Belmontes' Murder of Steacy McConnell

On March 15, 1981, respondent Fernando Belmontes armed himself with a metal dumbbell bar and went to burglarize the home of 19-year-old Steacy McConnell in Victor, California. Steacy was home when Belmontes arrived. After entering the house and discovering Steacy, Belmontes savagely beat her with the metal bar, severely fracturing her skull with about 20 blows and causing

approximately 15 gaping wounds to the side of her head. After delivering these fatal blows, Belmontes stole Steacy's stereo equipment.

Belmontes explained to his two accomplices who had been waiting outside in a getaway car that he had to "take out a witness." Later that afternoon, Belmontes sold Steacy's stereo for $100, split the money with his accomplices to the crime, and used some of it to buy beer.

Meanwhile, Steacy's parents came to her home and found their daughter lying unconscious in a pool of blood. Steacy died shortly afterward from cerebral hemorrhaging caused by the blows to her head. P.A. at 150a-154a.

The State Court Trial and Appeal

Following a trial in the San Joaquin County Superior Court, a jury found Belmontes guilty of first-degree murder. The jury also found true a statutory "special circumstance" rendering Belmontes eligible for the death penalty under California law. Cal. Pen. Code, § 190.2(a). P.A. at 242a.

Belmontes' trial proceeded to a penalty phase, in which the trier of fact determines whether to impose a sentence of death or life imprisonment without the possibility of parole. Cal. Pen. Code, § 190.3. The prosecutor introduced evidence in aggravation of five instances of Belmontes' violent or criminal conduct: his theft of a handgun in early 1979; his carrying the gun during the same time period; his 1979 conviction as an accessory to voluntary manslaughter; his commission of aggravated assault and battery against his pregnant girlfriend the month preceding Steacy's murder; and an assault he

committed while he was a ward in a county youth facility. The prosecution also presented aggravating evidence of autopsy photographs depicting the nature and extent of Steacy's fatal injuries. P.A. at 197a-199a.

In mitigation, the defense presented evidence of Belmontes' impoverished, unstable, and abusive upbringing; his caring and wholesome relationships with a number of decent friends and family members; and his good performance during a prior commitment to the California Youth Authority (CYA). This latter category of evidence related in part to Belmontes' participation in a church-related "M-2" sponsorship program provided at CYA. This evidence was offered to show that Belmontes had maintained more good relationships with decent people, that he had made a legitimate religious conversion, and that he therefore was a "salvagable" person who would be able to assist other inmates if committed to prison for life. J.A. at 4-115.

Both parties acknowledged that the jury could, and should, consider Belmontes' future prospects. Belmontes himself testified and asked the jury for a sentence of life in prison because, he said, "there is an opportunity to achieve goals and try to better yourself" in prison. He asked the jury to spare his life so he could "try to improve" himself. J.A. at 163-164. In closing statement, defense counsel argued that, in light of the evidence of Belmontes' prior CYA commitment, he could "fit[] into the system" and "contribute something" in the future. J.A. at 170. The prosecutor also acknowledged that the jury could and should consider Belmontes' future prospects of a life in prison in determining the proper punishment: "And I think that value to the community [in the future] is

something that you have to weigh in. There's something to that." J.A. at 155.

The trial court instructed the jury pursuant to California's then-existing standard instruction in capital cases. The particular instruction given here provided:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, except as you may be hereafter instructed. You shall consider, take into account, and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true.
>
> (b) The presence or absence of any criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the defendant acted under extreme duress or the substantial domination of another person.
>
> (f) The age of the defendant at the time of the crime.

> (g) *Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.*[2]

Cal. Jury Instructions, Criminal, No. 8.84.1[3] (4th ed. 1979) (CALJIC); J.A. at 183-184 (emphasis added). Belmontes expressly asked that the final catch-all portion of the instruction be given. J.A. at 137.

The trial court also gave the jury the following "special instruction."

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> However, *the mitigating circumstances which I have read for your consideration are given to you*

---

[2] The instruction was taken verbatim from California Penal Code section 190.3, and many of the listed factors could serve as either aggravating or mitigating circumstances, depending on what the trier of fact found. See *Tuilaepa* v. *California*, 512 U.S. 967, 978-79 (1994). The final catch-all factor, designated in this case as "factor (g)," is commonly referenced as "factor (k)" according to its statutory designation. See *Boyde* v. *California*, 494 U.S. at 373-74. To remain consistent with the text of the statute, the terminology employed in the lower court decision in this case, and the discussion concerning this instruction in *Boyde*, this final catch-all factor shall be referred to hereinafter as "factor (k)."

[3] CALJIC No. 8.84.1 has been amended at various times, and the factor (k) instruction is no longer phrased as it was when Belmontes was sentenced.

> *merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes.* You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

J.A. at 185-186 (emphasis added).

During jury deliberations, the trial court conducted a brief, informal exchange with the jurors in response to some of their questions:

> Juror Hern: The statement about the aggravation and mitagation (sic) of the circumstances, now, that was the listing?
>
> The Court: That was the listing, yes, ma'am.
>
> Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?
>
> The Court: That is right. It is a balancing process.

A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The court responded, "That is something you cannot consider in making your decision." J.A. at 191.

The jurors went back to their deliberations and ultimately returned a verdict of death. J.A. at 199-202.

On appeal to the California Supreme Court, Belmontes claimed that the factor (k) instruction given in his case improperly foreclosed consideration of background and character evidence unless it related to the offense itself.

Belmontes also argued that the trial court's responses to Juror Hern's inquiry about the "listing" and "balancing" of mitigating factors reinforced his claims that the California capital scheme might impermissibly require jurors to weigh the evidence in favor of death and did not allow them to consider sympathy for the defendant.

The California Supreme Court rejected these claims, finding the instructions and arguments, taken as a whole, fully and properly defined the scope and nature of the jury's sentencing responsibilities. P.A. at 202a-206a.

Belmontes' petition for certiorari was denied. *Belmontes* v. *California*, 488 U.S. 1034 (1989).

Federal Proceedings

After Belmontes' judgment became final, this Court in *Boyde* v. *California*, 494 U.S. 370, addressed the constitutional sufficiency of the factor (k) instruction. The Court rejected the claim that the factor (k) instruction limited the jury to evidence relating to the crime itself and did not allow for consideration of non-crime-related mitigating evidence. The *Boyde* Court held that there was no reasonable likelihood that jurors would interpret the factor (k) instruction to prevent consideration of mitigating evidence of background and character. *Id.* at 381-382.

On November 4, 1994, Belmontes filed an amended petition for writ of habeas corpus in the United States District Court for the Eastern District of California. As was true on direct state appeal, Belmontes raised no claim in federal habeas about the constitutional sufficiency of the factor (k) instruction for purposes of informing the jurors of their ability to consider evidence of his potential

future prospects as a life prisoner. Instead, the amended petition renewed Belmontes' claim that the trial court's answers to Juror Hern's mid-deliberation questions about the "listing" and "balancing" of mitigating factors led the jurors to misunderstand the proper scope of their sentencing determination, despite the other instructions previously given.

The district court rejected this claim, explaining that the overall instructions were sufficient to dispel any possible confusion and that neither the juror's inquiry, nor the court's comments, suggested a "misunderstanding or repudiation of these instructions." Citing *Boyde*, the district court concurred with the California Supreme Court: "the instructions and arguments taken as a whole fully and properly define the scope and nature of the jury's sentencing responsibilities." P.A. at 140a-141a.

On appeal to the Ninth Circuit Court of Appeals, Belmontes again claimed that the trial court's responses to Juror Hern's questions misled the jurors about the proper scope of their sentencing responsibilities. J.A. at 207-214, 224-235. A majority of a three-judge panel reversed Belmontes' penalty judgment. The opinion, authored by Judge Reinhardt and joined by Judge Paez, found prejudicial error under the Eighth Amendment based on the instructions regarding the various circumstances the jurors were told they could consider in determining Belmontes' sentence.

Though acknowledging that this Court in *Boyde* had approved the factor (k) instruction, the majority treated *Boyde's* holding as limited to cases in which the evidence in mitigation consists of general information about the defendant's "background and character" offered to "tend to

explain why the defendant committed the crime." P.A. at 58a. The instruction was constitutionally insufficient in this case, according to the panel majority, because it failed to inform the jurors that they could consider the proffered evidence of Belmontes' former commitment to CYA in determining whether he might adjust well to a life in prison. P.A. at 58a-60a.

The majority concluded that the asserted facial inadequacy of the factor (k) instruction, coupled with the trial judge's informal answers to Juror Hern's and Juror Hailstone's questions during deliberations, was reasonably likely to have misled the jurors to believe they were forbidden to consider evidence offered by Belmontes to show he "would live a productive life if permanently incarcerated in a structured environment." P.A. at 65a.

Judge O'Scannlain dissented, concluding that the majority's reasoning rested on a threefold misapplication of *Boyde*. First, *Boyde's* holding made it "perfectly clear" that all of Belmontes' proffered evidence in mitigation fell squarely within the ambit of the factor (k) instruction. Second, given the overall evidence and the uncontested arguments on both sides at the trial, any chance of the jury not appreciating the permissible scope of Belmontes' proffered evidence was "pure fantasy." P.A. at 76a. And third, in light of the overall instructions, there could be no reasonable likelihood, as required under *Boyde*, that the jury applied the factor (k) instruction in such a way as to foreclose consideration of any constitutionally-relevant evidence. Quoting *Boyde*, Judge O'Scannlain found that any such conclusion would turn the entire penalty-phase "into a virtual charade." P.A. at 82a (quoting *Boyde*, at 383).

The State's petition for en banc rehearing (J.A. at 236-252) was denied. Eight judges dissented from the order denying en banc rehearing, two of them issuing published opinions. Judge Callahan reiterated the concerns expressed by Judge O'Scannlain and added her view that the majority's reasoning amounted to a belated and unsupportable affront to the California Supreme Court's well-considered conclusion in this case. P.A. at 85a-96a. Judge Bea joined Judge Callahan's opinion and added two additional criticisms. First, Judge Bea objected to the panel majority's suggestion that the jurors should have been instructed to consider "mitigating" evidence bearing on Belmontes' probable future conduct (P.A. at 16a, 59a, 64a), reasoning that any such instruction characterizing specific evidence as "mitigating" would constitute an improper, argumentative comment on the evidence by the trial court. P.A. at 96a-97a. Second, Judge Bea concluded that the panel majority, in finding the factor (k) instruction to be insufficient, had misquoted and mischaracterized the instruction's language. Specifically, Judge Bea said that the majority had improperly interpreted the instruction's phrase "extenuates the gravity of the crime" to mean "extenuates [Belmontes'] culpability for the crime." P.A. at 58a. Judge Bea reasoned that factors which might "extenuate the gravity of a crime" can encompass "the extent that the criminal shows remorse, repents, or rehabilitates himself." P.A. at 97a-99a.

Thereafter, on April 30, 2004, the State sought certiorari in this Court. The State's petition for certiorari presented the same two questions raised herein.

While the State's petition was pending, this Court issued its opinion in *Brown* v. *Payton*, 544 U.S. 133 (2005). In *Payton*, the Ninth Circuit had struck down a death

judgment, finding that the California Supreme Court's opinion in that case did not pass muster under AEDPA. See 28 U.S.C. § 2254. The Ninth Circuit said that the state court had improperly relied on *Boyde* to find that the factor (k) instruction allowed for jury consideration of post-crime evidence of a defendant's religious conversion and good behavior in prison. *Boyde* was also inapposite, in the Ninth Circuit's view, because "the prosecutor in Payton's case misstated the law and the trial court did not give a specific instruction rejecting that misstatement." *Payton*, at 140-141.

In reversing the Ninth Circuit's decision, this Court held that the California Supreme Court had reasonably relied on *Boyde* because "*Boyde* established that [the factor (k)] does not limit the jury's consideration of extenuating circumstances solely to circumstances of the crime." *Boyde* "expressly rejected the suggestion that factor (k) precluded the jury from considering evidence pertaining to a defendant's background and character because those circumstances did not concern the crime itself." *Id.* at 141-142. This Court noted:

> After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.

Id. at 142-143. Although this Court found that the prosecutor improperly argued that the factor (k) instruction did not permit consideration of Payton's post-crime evidence, the Court nonetheless held that the California Supreme Court reasonably applied *Boyde* to conclude that, considering "the whole context of the trial," the improper prosecutorial argument "did not put Payton's mitigating evidence beyond the jury's reach." *Id.* at 144.

On March 28, 2005, this Court granted certiorari and remanded this case to the Ninth Circuit for further consideration in light of *Payton*. *Brown* v. *Belmontes*, 125 S.Ct 1697, 161 L.Ed.2d 518. In an opinion issued on July 15, 2005, the same Ninth Circuit panel majority again granted Belmontes habeas relief on the penalty phase judgment, citing the exact reasons set forth in its previous decision. P.A. at 230a-304a.

Despite this Court's remand for reconsideration in light of *Payton*, the majority asserted that *Payton* was inapplicable. While acknowledging "the similarity of the factual and legal issues" in *Belmontes* and *Payton*, the majority nonetheless found that *Payton* was not controlling because it had been decided under the deferential-review standard of AEDPA. Because *Belmontes* is not governed by AEDPA, the majority determined that it was free to "reach[] an independent legal judgment as to the constitutionality of the challenged instruction." P.A. at 231a-233a.

Judge O'Scannlain again dissented on the same grounds he raised in the earlier decision. He further stated that this Court's decision in *Payton* virtually foreclosed any chance of constitutional error here. P.A. at 304a-319a.

After the time for seeking rehearing in the circuit court had passed (Fed. R. App. P. 35(c), 40(1)), the Ninth Circuit issued a sua sponte order on August 2, 2005, for the parties to submit briefing setting forth their respective positions on whether the case should be reheard en banc. J.A. at 267. On October 24, 2005, the Ninth Circuit decided not to rehear the matter en banc. Seven judges dissented, including Judge Callahan, who issued an opinion finding that the panel majority's decision could not be reconciled with *Boyde* or *Payton*. J.A. at 290-299.

SUMMARY OF ARGUMENT

The primary issue in this case concerns this Court's holding in *Boyde* v. *California*, 494 U.S. 370, interpreting the constitutional sufficiency of California's catch-all factor (k) instruction, which directs jurors to consider "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime." In *Boyde*, this Court rejected a claim that this instruction limited the jury's consideration of mitigating evidence to the circumstances of the crime itself, holding that factor (k) also encompassed relevant evidence of a defendant's background and character. *Id.* at 381-382.

Belmontes' penalty phase case consisted entirely of background and character testimony. His character evidence was offered to show, among other things, that he was likely to adjust well to prison and perhaps contribute favorably in the future based on his performance during a prior juvenile CYA commitment. As in *Boyde*, the factor (k) instruction allowed the jurors to consider all such character evidence as perhaps extenuating the gravity of the

crime for purposes of their sentencing determination. Indeed, *Boyde* so obviously controls this case that Belmontes did not even assert to the Ninth Circuit that factor (k) prevented the jurors from considering any of his proffered mitigating evidence.

The Ninth Circuit nonetheless made an independent determination that factor (k) *does not* allow consideration of good character evidence. Interpreting *Boyde's* holding regarding factor (k) as being limited to character evidence bearing on a defendant's *culpability* for the crime, the Ninth Circuit concluded that the instruction violated the Eighth Amendment principles of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and its progeny because it allegedly did not permit consideration of "future-looking" prospects unrelated to culpability.

This conclusion, which divides "good character" evidence into discrete "culpability" and "forward-looking" components, defies common sense. For purposes of a capital sentencing determination, evidence of "good character" is virtually always "forward looking" because, apart from some inference about the defendant's present or future prospects, such evidence has little if any mitigating value.

The Ninth Circuit's conclusion is also irreconcilable with *Boyde*, which held that factor (k) was not limited to the circumstances of the crime itself. The circuit court's holding cannot logically be squared with a conclusion that *Boyde* limited factor (k) to evidence relating solely to culpability. Indeed, if the distinction between different forms of "good character evidence" were valid, the factor (k) instruction would have been insufficient to pass constitutional muster with respect to Boyde's "strength of

character" evidence, offered for the "forward-looking" purpose of showing that his crime was an aberration from otherwise good character. *Boyde*, at 381-382, n. 5.

Furthermore, even if there were some valid distinction between "general" and "forward-looking" good character evidence, the standard instruction in this case allowed consideration of all such "forward-looking" evidence. In making the solemn determination between life and death, jurors would reasonably interpret the directives to "consider all the evidence" and to take account of "any other circumstance that extenuates the gravity of the crime" to allow consideration of a defendant's character as possibly revealing worthwhile future prospects. They certainly would not believe they were *forbidden* from considering such evidence. Indeed, this Court's recent decision in *Payton* confirms that courts would reasonably rely on *Boyde* to find that factor (k) allowed consideration of "forward-looking" evidence of post-crime good behavior in prison. *Brown* v. *Payton*, 544 U.S. at 141-143. Moreover, this same general instruction's directive to take account of "the age of the defendant" allowed consideration of Belmontes' youth to show that, with time and maturity, he might adjust well in the future if sentenced to life. The standard instruction, therefore, was sufficient for the jury to give effect to the "forward-looking" implications of Belmontes' evidence of prior institutional adjustment.

Indeed, even if *Boyde* and *Payton* had not both *directly addressed* the *exact* instruction at issue, both of those cases would still compel a finding that the instructions given in this case, viewed in totality, *at least allowed* the jury to consider and give effect to Belmontes' proffered evidence. In addition to the standard instruction given in *Boyde* and *Payton*, the jurors in this case were given a

special instruction that informed them specifically that the previous instructions merely set forth "examples of some of the factors" to be considered in mitigation and that any one factor in mitigation "standing alone may support a decision that death is not the appropriate punishment in this case." The prosecution and the defense both openly acknowledged that the jury could and *should* consider Belmontes' future favorable prospects as mitigating evidence. There is virtually no chance – let alone a "reasonable likelihood," as required under *Boyde* – that the jury felt precluded from considering any of Belmontes' mitigating evidence.

Finally, the Ninth Circuit has violated the non-retroactivity doctrine of *Teague* v. *Lane* in holding that factor (k) does not extend to so-called "forward-looking" character evidence. Consistent with the *Lockett* line of cases, Belmontes was allowed to present any relevant character evidence he wished, and nothing affirmatively precluded the jury from considering any such evidence. There was no authority at the time Belmontes' judgment was pending that would have dictated the Ninth Circuit's conclusion regarding factor (k). Indeed, in light of *Boyde's* subsequent holding that factor (k) encompasses character evidence, it was at least debatable whether the instruction extended to so-call "forward-looking" character evidence. Nor was there any controlling precedent to dictate the Ninth Circuit's distinction between different forms of good character evidence. Indeed, the subsequent *Payton* decision reveals that it was at least reasonable to conclude that factor (k) applied to "forward-looking" evidence of good prison behavior.

ARGUMENT

I

THE NINTH CIRCUIT'S OPINION IS IRRECONCILABLE WITH THIS COURT'S HOLDING IN *BOYDE*

Belmontes' proffered evidence in mitigation all falls squarely within the holding of *Boyde* v. *California*. Belmontes' evidence of his performance during a prior juvenile commitment represents good character evidence that, within the meaning of California's factor (k) instruction, would "extenuate[] the gravity of the crime even though it is not a legal excuse for the crime." As this Court held in *Boyde*, California's factor (k) instruction does not limit a jury's consideration of mitigating factors to those relating to the crime itself but rather permits consideration of evidence unrelated to the crime, such as a defendant's background and character, that might mitigate the punishment the defendant should receive.

In this case, however, the Ninth Circuit panel majority adopted an unsupportably narrow interpretation of *Boyde*, which limits factor (k)'s reach to background and character evidence relating *exclusively* to the defendant's *culpability* for the charged offense. Because Belmontes' character evidence, which was offered in part to show likely prospects for good institutional adjustment, did not fit neatly within the narrow confines of "culpability," the panel majority found that such evidence was outside the scope of *Boyde* and beyond the reach of factor (k).

The panel majority's holding cannot be reconciled with *Boyde* or with logic. As was true in *Boyde*, the factor (k) instruction provided constitutionally sufficient guidance to allow consideration of all of Belmontes' proffered "good

character" evidence. Moreover, given the overall instructions in this case, there is virtually no chance – let alone a reasonable likelihood – that the jurors believed they were precluded from considering any relevant evidence in mitigation.

A. *Boyde* Establishes That California's Factor (k) Instruction Permits Consideration Of Any Relevant "Good Character" Evidence Offered In Mitigation

The central issue in *Boyde*, as in this case, was whether California's "catch-all" mitigation instruction, factor (k), limited the jury to consideration of mitigation evidence directly related to the crime in violation of the Eighth Amendment's requirement that a jury "consider and give effect to all relevant mitigation evidence" offered by the defendant. *Boyde*, 494 U.S. at 377-78. Boyde argued "[t]hat the 'catch-all' factor (k) [instruction] did not allow the jury to consider and give effect to *non-crime-related mitigation evidence*, because its language . . . limited the jury to other evidence that was *related to the crime*." *Boyde*, 494 U.S. at 378 (emphasis in original and added). This Court rejected Boyde's contention.

Considering the instruction "standing alone," this Court held there was no reasonable likelihood "that the jury applied the instruction in a way that prevents consideration of constitutionally relevant evidence." *Id.* at 380-81. The Court explained: "The instruction did not, as petitioner seems to suggest, limit the jury's consideration to 'any other circumstances *of the crime* which extenuates the gravity of the crime.' The jury was directed to consider *any other circumstance* that might excuse the crime, which certainly includes background and character." *Boyde*, 494

U.S. at 382 (emphasis in original). Thus, this Court held that California's "catch-all" mitigation instruction was constitutional, on its face, because it permitted – indeed, it "directed" – consideration of "any other circumstance" in mitigation that might extenuate the gravity of the crime. *Id.* at 380-82.

The Court in *Boyde* further held that "[e]ven were the language of the [catch-all] instruction less clear than we think, the context of the proceedings would have led reasonable jurors to believe that evidence of petitioner's background and character could be considered in mitigation." *Boyde*, 494 U.S. at 383. Examining the other instructions given to the jury, the Court concluded: "When factor (k) is viewed together with those instructions, it seems even more improbable that jurors would arrive at an interpretation that precludes consideration of all *non-crime-related* evidence [in mitigation]." *Id.* at 383 (emphasis added).

Belmontes' case in mitigation consisted of evidence of his impoverished, unstable, and abusive upbringing; his caring and wholesome relationships with a number of decent friends and family members; and his good performance during a prior commitment to CYA. Thus, Belmontes' mitigation evidence, like that in *Boyde*, did not relate directly to the circumstances of the crime. Rather, the evidence concerned Belmontes' background and character. In particular, the evidence of Belmontes' behavior while incarcerated in the past, offered in part to demonstrate good prospects for institutional adjustment, constituted evidence of his good character. *Skipper* v. *South Carolina*, 476 U.S. 1, 7 (1986) ("a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character . . . ").

As this Court held in *Boyde*, the factor (k) instruction given in this case directed the jury "to consider *any other circumstance* that might excuse the crime, which certainly includes background and character." *Boyde*, at 382 (original emphasis). The mitigation evidence presented in this case consisted entirely of Belmontes' background and character.

Thus, Belmontes' mitigation case, revolving around his background and character, falls squarely within the holding of *Boyde*. As in *Boyde*, the jury in this case was "directed to consider any other circumstance" such as background and character that might extenuate the gravity of the crime. In other words, the factor (k) instruction permitted the jury to consider Belmontes' mitigation evidence, which is all that the Eighth Amendment requires.

B. The Ninth Circuit's Artificial Parsing Of Good Character Evidence Into "General Character" And "Forward-Looking" Evidence Is Inconsistent With *Boyde* And This Court's Other Eighth Amendment Jurisprudence

Because "character" evidence – at least "good character" evidence – is virtually always presented to establish some inference about the defendant's likely present or future prospects, such evidence logically can have little if any relevance in mitigation aside from its potential "forward-looking" implications. In overturning Belmontes' death judgment, the Ninth Circuit panel majority nonetheless concluded that *Boyde's* analysis of the factor (k) instruction did not extend to any "forward-looking" character evidence.

Instead, the panel majority asserted that *Boyde's* approval of the factor (k) instruction was limited solely to "mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense." Because "forward-looking" character evidence, unrelated to *actual culpability*, was allegedly outside the scope of factor (k), the panel majority concluded that the instruction violated the general requirements of *Lockett* v. *Ohio*, 438 U.S. 586, *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), and *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), and the specific dictate of *Skipper* that "the jury must consider a defendant's past conduct as indicative of his probable future behavior." P.A. at 290a.

The panel majority's reasoning is both irreconcilable with the fundamental holding in *Boyde* and is inconsistent with logic. By its plain terms, *Boyde's* finding regarding the scope of the factor (k) instruction is not limited to evidence bearing solely on the defendant's *culpability* for the charged offense. To the contrary, *Boyde* recognized that when the factor (k) instruction is considered in light of the other instructions given (which were also all given in this case), reasonable jurors would in fact realize they were to consider all pertinent evidence offered in mitigation, whether or not it related to the crime itself. *Boyde*, at 381-383.

This Court in *Boyde* held that factor (k), which *directed* the jury to consider *any other circumstance which extenuates the gravity of the crime*, would certainly be understood to "include[] a defendant's background and character." *Id.* at 382. This Court has never said anything to support the panel majority's artificial parsing of

character evidence into discrete components of (1) "general" character, relating solely to culpability and (2) "forward-looking" character, relating to future prospects. To the contrary, *Skipper* impliedly rejected, as being "elusive," any distinction between mitigating evidence of a defendant's past good behavior and his future prospects of good behavior. *Skipper*, 476 U.S. at 6-7.[4]

Indeed, a significant portion of the proffered evidence in *Boyde*, which this Court found all to be within the ambit of the factor (k) instruction, was in fact "forward-looking." The *Boyde* Court rejected any claim that factor (k) precluded consideration of the defendant's "impoverished and deprived childhood, his inadequacies as a school student, *and his strength of character in the face of these obstacles.*" *Boyde*, 494 U.S. at 382 (emphasis added).

Boyde's purported "strength of character" in the face of such difficulties would have little if any meaningful relevance in mitigation if considered *only* in connection with his *culpability* for the underlying offense. This sort of "strength of character" evidence would relate naturally – and perhaps exclusively – to a defendant's "forward-looking" future prospects. Indeed, it is difficult to imagine any other reason why such evidence might have any significant mitigating value for purposes of a jury's sentencing determination.

The Court's discussion in footnote 5 of the *Boyde* decision further confirms factor (k)'s application to all

---

[4] Indeed, the relevant character evidence that was improperly excluded in *Lockett* consisted in large part of the defendant's forward-looking "prognosis for rehabilitation" coupled with her successful drug treatment. *Lockett*, 438 U.S. at 594.

relevant character evidence. Footnote 5 responded to Boyde's claim that factor (k) precluded the jury from considering evidence that he had won a dance prize while previously incarcerated. Boyde argued that such evidence was germane under *Skipper* v. *South Carolina* to show that he "could lead a useful life behind bars."

The Court rejected this claim because, among other reasons, such evidence related to Boyde's character strengths in the face of his earlier troubles and, therefore, was simply more "good character evidence" that factor (k) allowed the jury to consider as extenuating "the gravity of the crime because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Boyde*, 494 U.S. at 382, n. 5.

Boyde's dancing achievement during his prior incarceration certainly did not diminish his *personal culpability* for the murder itself, but such evidence theoretically might have "extenuated" the "gravity" of that culpability for sentencing purposes because it related to his general character. Indeed, to the extent that any of Boyde's character evidence might have shown his crimes to be an "aberration from otherwise good character," such evidence had no meaningful value in mitigation except to show that, based on his "otherwise good character," he was unlikely to engage in such "aberrant" conduct in the future. Like all of Boyde's proffered "strength-of-character" evidence, this evidence was, therefore, advanced simply to show that Boyde's life was worth saving.

Any inquiry about whether a potential capital defendant is "worth saving" is, by definition, "forward-looking." For purposes of a capital sentencing determination, it is difficult to imagine how general evidence of

"good character" could have any appreciable significance apart from the defendant's likely present or future prospects.

Belmontes' "forward-looking" evidence in mitigation was no different. As Judge O'Scannlain explained in dissent, the evidence supporting Belmontes' argument of future institutional adjustment consisted solely of testimonials regarding his background and character during his CYA commitment, and "*Boyde* makes it perfectly clear that testimony relating to a defendant's pre-crime background and character is within the jury's purview under factor (k)." P.A. at 306a. There is nothing in *Boyde* to suggest, as the panel majority found, that *Boyde's* holding did not encompass the mitigation evidence offered in this case.

A defendant might, of course, offer mitigating evidence of his personal traits or qualities that has no bearing on his present or future prospects but relates exclusively to his culpability.[5] Such a defendant might also present evidence to show that, irrespective of his "forward-looking" prospects, his life should be spared because he was somehow *once* a good person or had *once* performed good deeds or achieved worthwhile accomplishments. However, to the extent that such evidence does not bear on the defendant's *present or future prospects*, it is not evidence of his "*good character*"; absent some inference that such evidence relates to favorable "forward-looking"

[5] For example, a defendant might present evidence that, based on his personal characteristics, his crime was somehow the result of impulsiveness, mental deficiency, drug-induced psychosis, irrational tendency to react violently, propensity to follow others, etc.

prospects, it is merely "background" evidence that might provide an excuse for a sentence less than death.

For these reasons, evidence of a capital defendant's "good character" is virtually always "forward-looking" in some sense. Once again, *Boyde* expressly held that the factor (k) instruction provided sufficient guidance for jurors to consider a defendant's proffered character evidence. To the extent that evidence with no bearing on a defendant's present or future prospects might be interpreted as "character evidence" at all, there is nothing in *Boyde* to support the panel majority's view that factor (k) limits a jury's consideration to this small subspecies of "non-forward-looking" evidence, relating exclusively to actual culpability for the charged crime.

Indeed, this Court has consistently adopted a broad interpretation of the scope of mitigating "character evidence" and has never limited such evidence to the narrow "culpability" confines that the Ninth Circuit has read into *Boyde*. As noted above, the Court in *Skipper* acknowledged that evidence of a defendant's prior incarceration, offered to show a likely future of conformity in prison, is in fact a form of character evidence: "[A] defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character. . . . " *Skipper*, 496 U.S. at 7; see also *Tennard* v. *Dretke*, 542 U.S. 274, 285 (2004) (good character traits are not "typically traits to which criminal activity is attributable"); *Johnson* v. *Texas*, 509 U.S. 350, 369 (1993) (rejecting the argument that consideration of likely future behavior in prison is distinguishable from an assessment of moral culpability for the crime already committed).

In short, the panel majority's decision to strike down Belmontes' penalty judgment rests on an illusory distinction between "general good character" evidence and "forward-looking good character" evidence. Such a distinction is both logically untenable and irreconcilable with this Court's fundamental holding in *Boyde*.

C. Even If "General Good Character" Were Distinguishable From "Forward-Looking Good Character," The Instructions On Mitigating Evidence Given In This Case Did Not Preclude Consideration Of Any "Forward-Looking" Evidence Offered In Mitigation

Even assuming the existence of some meaningful distinction between "general character evidence" and "forward-looking character evidence," the standard instruction given in this case provided sufficient guidance to allow consideration of Belmontes' potential for "forward-looking" future institutional adjustment. The panel majority reasoned that *Boyde* is inapplicable in this case because Belmontes' evidence was not offered merely "to explain why the defendant committed the crime." P.A. at 292a. In this vein, the majority insisted that the language of the catch-all factor (k) instruction does not encompass "those forward-looking considerations" such as "evidence that would tend to prove that Belmontes would likely live a constructive life if permanently confined within a structured prison environment." P.A. at 293a.

Once again, this conclusion is logically untenable and is inconsistent with *Boyde*. As Judge Bea noted in dissent (P.A. at 98a-99a), the panel majority's finding that the factor (k) instruction would not be understood to encompass "forward-looking" evidence rests on an artificially

constrictive interpretation of the phrase "extenuates the gravity of the crime." "Extenuate" is defined as, "To lessen, to diminish; to weaken. . . . " Webster's Unabridged Dictionary (2nd ed. 1979).

Background and character evidence offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, while *perhaps* unrelated to the defendant's *culpability* for his offenses, would nonetheless be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Simply put, if jurors believed a defendant would present no future problems and might somehow *contribute* to society if sentenced to life, they would certainly realize such "extenuating" factors might diminish the "gravity" of the underlying crime for purposes of their sentencing determination. Logically, this instruction would, therefore, inform reasonable jurors that they could consider such evidence in determining whether a judgment of death was warranted or appropriate. As this Court noted in *Boyde*, jurors would naturally consider such background and character evidence as extenuating the gravity of the crime "even though it is not a legal excuse for the crime. . . . " *Boyde*, at 382 n. 5.

This Court's recent decision in *Payton* further confirms that jurors would understand the factor (k) instruction as encompassing evidence bearing on a defendant's likely post-crime behavior or character:

> After all, *Boyde* held that factor (k) directed consideration of any circumstance that might excuse the crime, and it is not unreasonable to believe that a postcrime character transformation could do so. Indeed, to accept the view that such evidence could not because it occurred after the

> crime, one would have to reach the surprising conclusion that remorse could never serve to lessen or excuse a crime. But remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability.

Payton, at 1439. In fact, *Payton* found that *Boyde's* interpretation of factor (k) was controlling precedent with respect to "forward-looking," post-crime evidence even where the prosecutor repeatedly and improperly argued, with no curative admonition from the trial court, that the jurors were *forbidden* from considering *any* of Payton's "forward-looking" evidence in mitigation. *Id.* at 1437-39.

Payton's reasoning applies with equal force to the "forward-looking" evidence presented by Belmontes. Background and character evidence, offered to show a likelihood of passive adjustment to a life in prison and worthwhile future prospects, would be reasonably understood by jurors as "extenuating" or diminishing the overall "gravity" of the offenses. Indeed, such a "forward-looking inquiry *is not independent of an assessment of moral culpability.*" *Johnson* v. *Texas*, 509 U.S. at 369 (emphasis added).

In its effort to distinguish *Boyde*, the panel below emphasized the *Boyde* Court's recognition of "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, *may be less culpable than defendants who have no such excuse.*" P.A. at 289a; *Boyde* at 352 (original emphasis). The panel majority declared that society has no "long held view" about the mitigating effect of a defendant's likely future conduct. Therefore, reasoned the panel, "in the absence of a clear instruction on point, jurors are not likely to be

aware in determining the appropriate punishment in such cases that the defendant's potential for a positive adjustment to life in prison constitutes a proper mitigating factor." P.A. at 293a.

This pronouncement – that absent a clear instruction on the matter, jurors would not otherwise consider a defendant's future prospects for nonviolent institutional adjustment – is at odds with common sense, inconsistent with this Court's previous views on the matter, and irrational in light of the record. Consideration of a defendant's potential future conduct is a long-established feature of the criminal justice system. "[A]ny sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose." *Jurek* v. *Texas*, 428 U.S. 262, 275 (1976). Indeed, this Court in *Skipper* expressly found that the consideration of a defendant's prior good behavior in prison, offered as indicative of his character for probable future conduct if sentenced to life in prison, "is an *inevitable* . . . element of criminal sentencing that is by its nature relevant to the sentencing determination." *Skipper*, 476 U.S. at 5 (emphasis added); see also *Payton*, 544 U.S. at 140 (describing the Ninth Circuit's conclusion regarding the jury's view of institutional adjustment evidence as mere "supposition" without precedential support).

There is virtually no chance any jury would simply disregard such an "inevitable" element of its sentencing determination and make an "elusive" distinction that precludes consideration of a defendant's future adaptability to prison. *Skipper* at 7. There is certainly no chance that the jurors did so in this case. As Judge O'Scannlain summarized in dissent, the jury heard, without objection, several witnesses testify about Belmontes' prior experience

in CYA. Belmontes himself asked the jury for a life-in-prison sentence based on his future prospects and goals. Belmontes' counsel and the prosecution *both* effectively and unambiguously argued that, in light of the evidence of Belmontes' background, the jury could and *should* consider his future prospects of a life in prison in determining the proper punishment. Neither the trial court nor any of the parties or witnesses said anything to countermand the clear message that the jury could consider Belmontes' character of prior conformance while incarcerated in determining his likely future prospects.

As Judge O'Scannlain noted in dissent, the panel majority's view that the jury nonetheless felt constrained to reject all such evidence and argument necessitates a finding "that the jury thought that the witnesses wasted their time by testifying, and that the prosecutor, Belmontes, and Belmontes' lawyer were not smart enough to realize they were all mistaken." P.A. at 311a. As was true in *Boyde*, reasonable jurors would not have believed the court's instructions somehow "transformed all of this 'favorable testimony [and unrebutted argument] into a virtual charade.'" P.A. at 317a; *Boyde*, at 383-84 (quoting *California* v. *Brown*, 479 U.S. 538, 542 (1987); see also *Payton*, at 1440 ("like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all").

The jurors here, plainly aware of the gravity of their sentencing decision, would have rationally given broad meaning to the directive to "consider all the evidence" in arriving at a judgment of life or death. J.A. at 183; see *Johnson* v. *Texas*, 509 U.S. at 370 (a capital jury is aware of the consequences of its determination and is likely to

give an expansive view of the mitigating evidence); *Buchanan* v. *Angelone*, 522 U.S. 269, 278 (1998) (even if instructions were unclear as to whether jury could consider particular mitigating evidence, it was unlikely that jurors disregarded it in light of instruction to consider "all the evidence"). It is certainly *unreasonable* to believe that the jurors nonetheless refused to consider Belmontes' proffered evidence, in contravention of everything that had been presented and said, based on an alleged ambiguity in factor (k)'s wording.

Indeed, any chance of the jurors misreading the factor (k) instruction to foreclose consideration of Belmontes' evidence is even more remote in view of the entire instruction. *Boyde*, at 378 (citing *Cupp* v. *Naughten*, 414 U.S. 141 (1973)). In addition to factor (k)'s directive to consider "[a]ny other circumstance which extenuates the gravity of the crime," the standard CALJIC 8.84.1 instruction also directed the jurors to "consider all of the evidence" and to take account of several factors, including "[t]he age of the defendant at the time of the crime." J.A. at 183-184; *Boyde*, at 373, n. 1.

The instruction to take account of Belmontes' youth[6] naturally allowed the jurors to consider his future prospects. As the Court explained in *Johnson* v. *Texas*, 509 U.S. at 350, "It strains credibility to suppose that [a] jury would [view] evidence of [a defendant's] youth as outside its effective reach" in determining whether the defendant would continue to be violent in the future. *Id.* at 368. By parity of reasoning, a jury instructed to consider a

---

[6] Belmontes was one month shy of age 20 when he murdered Steacy McConnell. P.A. at 199a.

defendant's age would understand that youth might be relevant in determining whether the defendant would continue to be dangerous in the future.

If the jurors found that Steacy McConnell's murder was somehow attributable to the "transient qualities of [Belmontes'] youth," they would certainly realize his potential for future violence might well subside with the benefit of time and maturity. *Johnson*, at 370. The jurors would "readily comprehend" that the "ill effects of youth," which are "subject to change," could be germane in evaluating Belmontes' future prospects. *Id.* at 369. In making such a determination, the jurors certainly would not "have deemed themselves foreclosed from considering" Belmontes' proffered evidence relating to "future dangerousness." *Id.* at 370. Having been told to consider Belmontes' youth, the jury naturally would have also considered the proffered evidence of his prior CYA commitment as tending to show that, with the benefit of age, he "would likely live a productive life if permanently confined within a structured prison environment." P.A. at 293a.

The directive to take account of the defendant's age was, therefore, sufficient by itself to permit the jury to "consider and give effect" to Belmontes' future prospects as a life prisoner. The Eighth Amendment requires no more. *Blystone* v. *Pennsylvania*, 494 U.S. 299, 304-05 (1990); *Penry* v. *Lynaugh*, 492 U.S. at 328. In any event, in light of the instructions to "take account of the defendant's age" and to consider "all the evidence," no rational juror would have misinterpreted the factor (k) instruction's directive to consider "any other circumstance which extenuates the gravity of the crime" to foreclose consideration of any so-called "forward-looking" character evidence. As was true in *Boyde*, the standard CALJIC 8.84.1 instruction in this

case was facially sufficient to allow consideration of all Belmontes' proffered mitigating evidence.

D. The Ninth Circuit's Finding Of An Eighth Amendment Violation In This Case Cannot Be Reconciled With The Controlling *Boyde* Standard For Assessing Ambiguous Instructions

In assessing whether California's factor (k) instruction violates the Eighth Amendment, "the proper inquiry . . . is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, at 380. In making this determination, the "single instruction . . . may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde*, at 378.

The panel majority's finding of a "reasonable likelihood" of error underscores the Ninth Circuit's confusion concerning the controlling *Boyde* standard. Indeed, if the overall instructions and arguments in this case were somehow insufficient to inform jurors they could consider Belmontes' mitigating evidence, the "reasonable likelihood" standard set forth in *Boyde* would be all but meaningless.

Even if it were assumed that factor (k) was insufficient by itself, the additional instructions in this case clearly informed the jurors that they could consider *any* mitigating factor established by the evidence, including Belmontes' likely future institutional adjustment. In addition to the court's orders to (1) "consider all the evidence," (2) take account of "[t]he age of the defendant," and (3) take account of [a]ny other circumstance which

extenuates the gravity of the crime" (J.A. at 183-184), the jurors were given the following "special instruction":

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> *However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.*

J.A. at 185-186 (emphasis added).

The panel majority unjustifiably concluded that this special instruction "exacerbated" the jury's alleged "confusion." The majority focused exclusively on the instruction's second paragraph, finding that the second and third sentences somehow served to undermine and contradict the plain meaning of the first sentence, which informed the jurors that the enumerated mitigating circumstances were "merely examples of some of the factors" they could consider in mitigation. P.A. at 294a.

No reasonable juror could have interpreted this special instruction as the panel majority insists. The first paragraph expressly told the jurors that they were

forbidden from considering *any factor in aggravation* beyond those which had been specifically enumerated and defined. Conversely, the only rational reading of the second paragraph's first sentence is that the jury's determination of mitigating factors *was not limited* to those expressly enumerated. Logically, the jurors could only conclude that they were free to consider other factors not enumerated. Moreover, the only reasonable interpretation of the directive to "pay careful attention to each of these factors," and the explanation that "any one of them standing alone may support a decision that death is not the appropriate punishment," is that the jury should consider *any* mitigating factor it found *whether expressly listed or not.* Jurors would "naturally" and "inevitably" consider Belmontes' "past conduct as indicative of his proper future behavior." *Boyde*, at 382 n. 5; *Skipper*, at 5.

As Judge O'Scannlain recognized, in light of this special instruction, there could be "little doubt that the court conveyed the message that the enumerated factors were not the exclusive mitigating circumstances that the jury could consider." P.A. at 314a. Similarly, as Judge Callahan noted, any chance of the jury misinterpreting this special instruction as the panel majority speculates "defies logic." P.A. at 89a.

The *Belmontes* majority also erroneously found that the trial judge somehow "compounded the problem" with his informal answers to juror questions during deliberations.[7] P.A. at 295a-299a. For the reasons discussed,

---

[7] Although the trial judge's answers to Juror Hern's questions provided the *sole* basis of Belmontes' claim of instructional error in the district court and in his Ninth Circuit appeal, they have now been

(Continued on following page)

however, there simply was no "problem" to compound. The jurors were expressly told that their consideration of any possible mitigating factors was unlimited.

In any event, there is no reasonable likelihood the trial court's answers to the jurors misled them. Juror Hern asked, "The statement about the aggravation and mitigation of the circumstances, now, that was the listing." The court replied, "That was the listing, yes, ma'am." Juror Hern then asked, "Of those certain factors we were to decide one or the other and then balance the sheet?" The court replied, "That is right. It is a balancing process." A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The court responded, "That is something you cannot consider in making your decision." J.A. at 191.

Juror Hern's inquiry did not convey a misunderstanding about the factors to be considered in the penalty phase deliberations. Her use of the word "listing" did not reflect a view that extenuating or mitigating circumstances were restricted to those specifically enumerated. Nor did her use of the metaphor, "balance the sheet," convey an unconstitutionally restrictive understanding of the jury's role in penalty phase determinations. Indeed, the trial court's answer to Juror Hern's question properly characterized the balancing process of penalty phase determinations under California law. See *People* v. *Bacigalupo*, 6 Cal.4th 457, 470; 862 P.2d 808, 815; 24 Cal.Rptr.2d 808, 815 (1993). The court's comment not to consider possible

---

relegated to a "supporting role" in this newfound challenge to the factor (k) instruction.

psychiatric treatment in prison was also correct under California law because no evidence even remotely relating to the matter had been presented. *People* v. *Crittenden*, 9 Cal.4th 83, 143-44; 885 P.2d 887, 922; 36 Cal.Rptr.2d 474, 509 (1994); see also CALJIC 1.03.[8]

As Judge Callahan understood in a way the panel majority failed to see, these juror inquiries do not necessarily establish any jury confusion but rather "just as easily show that the jury was taking its duty seriously before reaching a verdict." Furthermore, the trial court's responses to these questions were all correct statements of law. P.A. at 91a-92a.

In any event, during this same informal conference with the jurors, the court directed them to "go over the instructions again with one another." J.A. at 190. The trial court's directive to review the previous instructions would have cured any possible confusion. See *Weeks* v. *Angelone*, 528 U.S. 225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves). The previous instructions, of course, unambiguously informed the jurors (1) that they were to "consider all of the evidence which has been received during any part of the trial," (2) that they were to consider "[a]ny other circumstance which extenuates the gravity of the

---

[8] See P.A. at 316a-317a (O'Scannlain, J., dissenting) (citing *Hughes* v. *Borg*, 898 F.2d 695, 700 (9th Cir. 1990) (jurors' duty confined to considering only the evidence presented in open court); *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) ["Unlike a legislature, whose judgments may be predicated on educated guesses and need not necessarily be grounded in facts adduced in a hearing, a jury is bound to consider only the evidence presented to it in arriving at a judgment."]).

crime even though it is not a legal excuse for the crime," and (3) that potential mitigation factors were not limited to those that had been enumerated. Neither the court nor the parties ever said anything to suggest that the jurors were limited or in any way restricted from using any mitigating evidence in any way they saw fit.

To the contrary, defense counsel and the prosecutor both clearly acknowledged that the jurors could and *should* consider Belmontes' likely future prospects as a life prisoner when making their penalty determination. Because both parties agreed that the jury should consider Belmontes' character evidence as relating to his future prospects, there is no reasonable likelihood that the jurors nonetheless believed they were precluded from considering any of that evidence. See *Buchanan* v. *Angelone*, 522 U.S. at 278-279.

In *Boyde*, this Court warned that, although there is a strong policy for accurate sentencing determinations in capital cases, "there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation." *Boyde*, at 380. This Court has also held that a theoretical or abstract claim of improper jury instructions is insufficient to establish constitutional error. *Cupp* v. *Naughten*, 414 U.S. at 147-49.

The claimed error here is, at best, speculative and theoretical. As in *Boyde*, the factor (k) instruction did not preclude the jurors from considering any evidence in mitigation. Like the evidence in *Boyde*, the evidence here related to Belmontes' character, specifically his character for passive conformity in an institutional setting. As in *Boyde*, factor (k) informed the jurors they could consider any such evidence. As in *Payton*, there is no reasonable

chance that the factor (k) instruction, even standing alone, would be misinterpreted to preclude consideration of "forward-looking" considerations based on probable post-crime behavior. *Payton*, at 1439-40.

Moreover, as this Court also observed in *Boyde*:

> Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde, at 380-81. The Ninth Circuit's finding of constitutional instructional error relies entirely on legal hairsplitting, with no regard for a commonsense understanding of the overall instructions and without consideration of what actually occurred in the penalty-phase trial. In light of the overall particulars here, no reasonable juror would have made the "elusive" distinction between past conduct and future behavior suggested by the majority. *Skipper*, at 6-7.

Even assuming some possible ambiguity in the factor (k) instruction, the jurors here were clearly instructed (1) that they were not limited to any preordained mitigating circumstances and (2) that their finding of any single mitigating circumstance, whether expressly enumerated or not, could be sufficient to support a decision that the death penalty was inappropriate. Moreover, the closing statements by both the prosecution and the defense made it clear that the jury was to consider and weigh all of Belmontes' mitigating evidence, including his future prospects in prison.

The jurors in this case very clearly understood they could consider any evidence in mitigation and give any such evidence whatever weight they felt it deserved. There is virtually no chance, let alone a reasonable likelihood, the jurors interpreted or applied the instructions here to prevent them from considering any relevant evidence in mitigation. There simply is no rational basis to conclude that the judgment in this case rests on an Eighth Amendment violation.

II

THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989)[9]

In granting Belmontes federal habeas relief, the panel majority interpreted the Eighth Amendment to impose requirements never established or even contemplated by this Court when Belmontes' judgment became final. Recognizing the general principle, set forth in *Lockett* and

---

[9] The State did not invoke *Teague* in its brief to the Ninth Circuit, and the panel majority's opinion contains no *Teague* analysis. This is because Belmontes' claim in the district court and on Ninth Circuit appeal concerned solely the propriety of the trial judge's responses to Juror Hern's questions. J.A. at 207-214, 224-235. Indeed, the panel majority acknowledged that Belmontes had not challenged the sufficiency of the factor (k) instruction: "Although Belmontes' briefs emphasize the trial judge's mid-deliberation colloquy with Juror Hern, the Court has held that we must examine claims of instructional error in light of the record as a whole." P.A. at 291a-292a. Accordingly, the State had no opportunity or reason to address the current *Teague* issue until after the panel majority issued its decision. The State *did* invoke *Teague* at the first opportunity in its petition for rehearing following the panel's initial decision. J.A. at 235-252.

its progeny, that a state may not affirmatively preclude a jury's consideration of relevant mitigating evidence, the circuit court concluded that California's factor (k) instruction violated the Eighth Amendment because it allegedly precluded consideration of so-called "forward looking" evidence.

This interpretation of the Eighth Amendment effectively relies on a "new rule" which was not dictated by precedent when Belmontes' judgment became final. At the very least, the panel majority has applied the *Lockett* line of cases in a "novel" manner that is incompatible with *Teague*.

Under *Teague*, a defendant may not receive federal habeas relief based on a new rule of federal constitutional law not "dictated by precedent existing when the judgment in question became final." *Stringer* v. *Black*, 503 U.S. 222, 227-29 (1992); *Butler* v. *McKellar*, 494 U.S. 407 (1990); *Teague*, 489 U.S. 288. Even when the asserted basis of a constitutional violation does not rest on a "new rule," habeas relief is still precluded where the prior precedent upon which it relies is applied in a "novel setting." *Stringer*, at 228; *Butler*, at 414-15. "The result in a given case is not dictated by precedent if it is susceptible to debate among reasonable minds, or, put differently, if reasonable jurists may disagree." *Graham* v. *Collins*, 506 U.S. 461, 476 (1993) (quoting *Stringer*, at 238, Souter, J., dissenting).

Belmontes' judgment became final when this Court denied certiorari of his direct appeal on January 17, 1989. *Belmontes* v. *California*, 488 U.S. 1034. Prior to that time, no precedent dictated the circuit court's conclusion regarding

the federal constitutional sufficiency of the factor (k) instruction.

In *Lockett* v. *Ohio*, a plurality of the Court held that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of his character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (original emphasis, footnote omitted.) Later, in *Eddings* v. *Oklahoma*, a majority of the Court applied *Lockett* to hold that a sentencer may not "refuse to consider, *as a matter of law*, any relevant mitigating evidence." *Eddings*, 455 U.S. at 114 (original emphasis).

Consistent with *Lockett* and *Eddings*, the Court in *Skipper* v. *South Carolina* struck down a death judgment where the sentencing court refused to consider evidence of a defendant's post-crime behavior in jail to demonstrate his likely future adaptability to prison. *Skipper*, 476 U.S. at 4-5. As the *Skipper* Court properly held, the exclusion of such evidence violated *Lockett* and its progeny because "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination." *Id.* at 7. As of 1987, the rule was that "the sentencer" may not refuse to consider or be instructed not to consider any nonstatutory mitigating circumstances. *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987).

Indeed, in subsequent cases the Court has confirmed that:

> *Lockett* and its progeny stand only for the proposition that a State may not cut off in an absolute

> manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all.

Johnson v. *Texas*, at 361 (quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 456 (1990), Kennedy, J., concurring).

Nothing in the *Lockett* line of cases dictated the Ninth Circuit's conclusion regarding any alleged shortcomings of California's factor (k) instruction. The factor (k) instruction given in this case recited verbatim the language of the California statute, which permits consideration of all mitigating evidence. *People* v. *Frierson*, 25 Cal.3d 142, 178; 559 P.2d 587, 608; 158 Cal.Rptr.2d 281, 301-302 (1979). Consistent with *Lockett* and its progeny, Belmontes was allowed to present in mitigation whatever relevant background and character evidence he wished. None of the instructions in this case *expressly prohibited* the jury from considering or giving effect to any of that mitigating evidence, and no authority extant while Belmontes' judgment was pending dictated the conclusion that factor (k) would be misunderstood to preclude consideration of any such evidence. The panel majority's finding of an Eighth Amendment violation in this case is, therefore, barred under *Teague*.

If any doubt remained on this point, this Court's holding in *Boyde*, issued after Belmontes' judgment was final, put such concerns to rest. Because *Boyde* affirmed the constitutionality of the factor (k) instruction, even "standing alone," with respect to background and character evidence unrelated to the charged crime (*Boyde*, at 381), it is inconceivable "that all reasonable jurists," prior to *Boyde*, would have nevertheless "deemed themselves

compelled to accept" the Ninth Circuit's view that factor (k) violated the Eighth Amendment by misleading jurors to ignore so-called "forward-looking" character evidence. *Graham*, at 477.

In light of the subsequent *Boyde* decision, it certainly cannot be said that the *Lockett* line of cases dictated the Ninth Circuit's holding regarding the factor (k) instruction's purported constitutional infirmity. Indeed, this Court has held that *Teague* barred similar attempts to extend *Lockett*. See, e.g., *Saffle* v. *Parks*, 494 U.S. 484, 488-490 (1990) (because the defendant was allowed to present all relevant mitigating evidence, *Lockett* and *Eddings* did not dictate a finding of error based on the fact that the jury was instructed not to consider such evidence for purposes of sympathy); *Graham* v. *Collins*, 506 U.S. at 470-477 (because the defendant was allowed to present relevant mitigating evidence of family background and positive character traits, which the jury could consider under Texas' three "special issues," *Lockett* and its progeny did not dictate a finding of constitutional error even though such evidence might have had mitigating value beyond the three statutory "special issues"). Nothing in the *Lockett* line of cases compelled a finding that factor (k) prohibited consideration of so-called "forward-looking" character evidence.

Indeed, no precedent extant while Belmontes' judgment was pending dictated, or even supported, the Ninth Circuit's distinction between different forms of "general" and "forward-looking" evidence of good character. To the contrary, the *Skipper* Court rejected any distinction between behavior bearing on a defendant's past character and behavior bearing on "future adaptability" as being "elusive." *Skipper*, at 7; see also *O'Dell* v. *Netherland*, 521

U.S. 151 (1997) (*Skipper's* holding that juries must be allowed to consider evidence that a defendant would not pose a future danger in prison did not dictate, under *Teague*, *Simmons*'[10] later holding that juries must be allowed to consider evidence that a defendant will be ineligible for parole if sentenced to life); *Graham*, 506 U.S. 476 (no reason to regard the circumstance of a defendants age as being distinguishable from the circumstances of his family background and positive character traits because "virtually any mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' ").

Again, in light of *Boyde's* subsequent holding that factor (k) permitted consideration of the defendant's "strength of character" evidence (*Boyde*, at 381-382), the instruction's application to "forward-looking" character evidence was at least "susceptible to debate among reasonable minds" when Belmontes' judgment was pending. *Graham*, at 476. *Payton* reinforces this conclusion. Because it was *at least reasonable* for the state court to conclude that *Boyde* applied to Payton's "forward-looking" post-crime evidence (*Payton*, at 141-143), it was also reasonable to conclude, even before *Boyde*, that factor (k) permitted consideration of Belmontes' "forward-looking" evidence of prior institutional adjustment. It would not have been "apparent to all reasonable jurists" at that time that the instruction at issue violated the Eighth Amendment. *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997). There certainly was no precedent at the time Belmontes' judgment became final that would have compelled all

[10] See *Simmons* v. *South Carolina*, 512 U.S. 154 (1994).

reasonable jurists to distinguish *Boyde* and *Payton* to find an Eighth Amendment violation in Belmontes' case. The Ninth Circuit's decision to grant habeas relief in this case was not dictated by earlier precedent and, therefore, is barred under *Teague*.

Neither of *Teague's* two narrow exceptions apply here. The panel majority's holding clearly does not qualify under the first *Teague* exception. The circuit court's conclusion regarding the scope of California's factor (k) instruction does not seek "to decriminalize a class of conduct [ ]or prohibit the imposition of capital punishment on a particular class of persons." *Saffle*, 494 U.S. at 494-495 (citing *Butler*, 494 U.S. at 415; *Teague*, 489 U.S. at 311).

Teague's second exception, affording retroactive application for "watershed rules of criminal procedure," is also inapplicable here. The rule announced by the Ninth Circuit, that declares the factor (k) instruction to be constitutionally insufficient to allow consideration of the "forward-looking" implications of a defendant's proffered evidence of good character, certainly does not amount to a landmark "watershed" rule of the sort contemplated by *Teague*. Even assuming that the Ninth Circuit's constitutional analysis were correct, this conclusion certainly would not alter our basic understanding of the "bedrock procedural elements" essential to "the fairness of a proceeding." *O'Dell* v. *Netherland*, 521 U.S. at 167; *Sawyer* v. *Smith*, 497 U.S. 227, 242 (1990); *Teague*, at 311.

CONCLUSION

For the reasons set forth herein, the State respectfully submits that the judgment of the Ninth Circuit should be reversed.

BILL LOCKYER
Attorney General of the State of California
MANUEL M. MEDEIROS
State Solicitor General
DONALD E. DE NICOLA
Deputy Solicitor General
ROBERT R. ANDERSON
Chief Assistant Attorney General
MARY JO GRAVES
Senior Assistant Attorney General
WARD A. CAMPBELL
Supervising Deputy Attorney General
MARK A. JOHNSON
Assistant Supervising Deputy Attorney General
Counsel of Record
1300 I Street
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-5437
Counsel for Petitioner

835

08

No. 05-493

Supreme Court, U.S.
FILED
AUG 7 - 2006
OFFICE OF THE CLERK

In The
Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENT'S BRIEF ON THE MERITS

ERIC S. MULTHAUP
Counsel of Record
State Bar 62217
20 Sunnyside Avenue, Suite A
Mill Valley, CA 94941
(415) 821-6000
(415) 389-0865 FAX

CHRISTOPHER H. WING
State Bar 63214
1101 "E" Street
Sacramento, CA 95814
(916) 441-4888
(916) 441-1575 FAX

Attorneys for Respondent
Fernando Belmontes
In Forma Pauperis

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

	Page
RESPONDENT'S BRIEF ON THE MERITS	1
STATEMENT OF THE CASE	1
A. Proceedings Below	1
B. Guilt Phase Evidence	2
C. Penalty Phase Proceedings	4
1. Evidence in aggravation	4
2. Evidence in mitigation	4
3. The penalty arguments, instructions, and deliberations	5
D. The Panel Majority Decision	14
SUMMARY OF ARGUMENT	15
ARGUMENT	17
I. AN UNUSUAL SERIES OF CIRCUMSTANCES AT RESPONDENT'S PENALTY TRIAL COMBINED TO CONVEY TO THE SENTENCING JURY THAT IT WAS NOT PERMITTED TO CONSIDER A SUBSTANTIAL PART OF THE MITIGATION EVIDENCE, VIOLATING THE EIGHTH AND FOURTEENTH AMENDMENTS AS THE COURT OF APPEALS HELD	17
A. Respondent Presented *Skipper* Evidence as a Substantial Part of His Evidence in Mitigation	18
B. California's Factor (k) Instruction Functions Least Effectively With Respect to Informing a Jury of Its Obligation to Consider the Mitigating Import of *Skipper* Evidence	19

TABLE OF CONTENTS – Continued

Page

C. The Trial Court's Decision to Give One of the Defense Supplemental Instructions That Contained References to Matters Addressed in Instructions Not Given Created a Confusing Inconsistency Within the Instructions Given to the Jury 21

D. The Trial Court's Impromptu Answers to the Jurors' Mid-Deliberation Questions Fatally Skewed the Resulting Death Verdict 22

1. The jury's disclosure of a deep internal division. 22

2. Juror Hern's initiative to clarify and simplify the penalty decision 23

3. The trial court's directive not to consider the matter of concern raised by Juror Hailstone's inquiry 26

E. The Arguments of Counsel Reinforced the Erroneous View that Respondent's Skipper Evidence Did Not Fall Within Factor (k) or Any Other Factor 28

1. The prosecutor's acknowledgment that respondent's *Skipper* evidence did not fall within the enumerated instructional factors 28

2. Defense counsel's concession that respondent's *Skipper* evidence did not extenuate the gravity of the crime 29

F. The Jurors' Subsequent Questions Confirming the Improperly Restrictive Consideration of Mitigating Evidence 31

TABLE OF CONTENTS – Continued

Page

G. The Mutually Reinforcing Effects of the Instructions and Argument 32

II. THE STATE'S ARGUMENTS SEEKING TO AVOID THE CONCLUSION OF THE NINTH CIRCUIT PANEL AND CRITICIZING THE PANEL DECISION ARE MERITLESS..... 36

A. The State's Untenable Claim of a Conflict Between the Panel Majority Opinion and this Court's *Boyde* Jurisprudence..... 36

1. The import of *Boyde* 37

2. The panel's reference to the *Boyde* distinction between background and character evidence versus future institutional adjustment evidence..... 38

B. Other Deficiencies in the State's Arguments Regarding the Case-Specific Factors Relied on by the Panel Majority..... 40

1. The State's failure to recognize the confusing instructions given by the trial court that conflicted with the factor (k) instruction 40

2. The State's incorrect assertion that during the mid-deliberation colloquy the trial court directed the jury to go over the original instructions..... 41

3. The State's untenable claim that the jurors' questions show mere conscientiousness rather than confusion 43

TABLE OF CONTENTS – Continued

Page

4. The State fails to acknowledge that the mid-deliberation instructions provided the framework in which the jury actually reached its penalty decision 45

III. THE STATE HAS DISTORTED THE PANEL'S DECISION IN CLAIMING A *TEAGUE* VIOLATION 46

CONCLUSION 49

TABLE OF AUTHORITIES

Page

CASES

Arroyo v. *Jones*, 685 F.2d 35 (2d Cir. 1982) 45

Belmontes v. *Brown*, 414 F.3d 1094 (9th Cir. 2005) 2, 14, 15, 47

Belmontes v. *Woodford*, 359 F.3d 1079 (9th Cir. 2004) 1

Bollenbach v. *United States*, 326 U.S. 607 (1946) 44, 45

Boyde v. *California*, 494 U.S. 370 (1989) ..... *passim*

Brown v. *Belmontes*, 125 S.Ct. 1697 (2005) 1

Brown v. *Payton*, 544 U.S. 133 (2005) 1, 35

Buchanan v. *Angelone*, 522 U.S. 269 (1998) 42

Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 16, 47, 48

Hitchcock v. *Dugger*, 481 U.S. 393 (1987) 41, 46, 47

Lockett v. *Ohio*, 438 U.S. 586 (1978) 46, 48

Mills v. *Maryland*, 486 U.S. 367 (1988) 46

O'Dell v. *Netherland*, 521 U.S. 151 (1997) 47

Penry v. *Johnson*, 532 U.S. 782 (2001) ..... *passim*

Penry v. *Lynaugh*, 492 U.S. 302 (1989) 17, 32, 36, 48

People v. *Belmontes*, 45 Cal.3d 744 (1988) 1, 2, 3, 4

Shafer v. *South Carolina*, 532 U.S. 36 (2001) 44

Simmons v. *South Carolina*, 512 U.S. 154 (1994) 44, 47

Skipper v. *South Carolina*, 476 U.S. 1 (1986) ..... *passim*

Smith v. *Texas*, 542 U.S. 37 (2004) 20

Teague v. *Lane*, 489 U.S. 288 (1989) 47

Tennard v. *Dretke*, 542 U.S. 274 (2004) 20

TABLE OF AUTHORITIES – Continued

Page

Tuilaepa v. *California*, 512 U.S. 967 (1994) 27

Weeks v. *Angelone*, 528 U.S. 225 (2000) 17, 42, 43, 44

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. VIII 14, 36, 46, 47

U.S. Const. amend. XIV 14, 36, 46

STATUTES CITED

28 U.S.C. § 2254 1

California Penal Code § 190.3 40

OTHER AUTHORITIES

CALJIC No. 8.841 ..... 5, 21

STATEMENT OF THE CASE

A. Proceedings Below.

Respondent Fernando Belmontes was charged in San Joaquin County Superior Court with the March 15, 1981 murder of Steacy McConnell, accompanied by robbery and burglary special circumstance allegations. One co-defendant, Bobby Bolanos, turned state's evidence and was permitted to plead to a simple burglary. Another co-defendant, Domingo Vasquez, was permitted to plead guilty to second-degree murder. Respondent went to trial, was convicted as charged, and following a penalty trial was sentenced to death on October 6, 1982.

The judgment was affirmed by the California Supreme Court on June 23, 1988. *People* v. *Belmontes*, 45 Cal.3d 744 (1988). This Court denied respondent's petition for writ of certiorari on January 3, 1989. Respondent filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of California, upon which proceedings were stayed while respondent exhausted state remedies as to certain claims.

On June 29, 1993, upon denial of the habeas corpus petition by the California Supreme Court, the district court lifted the stay of the 28 U.S.C. § 2254 action, and respondent filed an amended petition.

On May 14, 2001, the district court entered a judgment denying the petition. This appeal followed. The Ninth Circuit issued an opinion granting habeas corpus relief, *Belmontes* v. *Woodford*, 359 F.3d 1079 (9th Cir. 2004) [*Belmontes I*]. This Court granted certiorari and remanded for further consideration in light of *Brown* v. *Payton*, 544 U.S. 133 (2005). *Brown* v. *Belmontes*, 125 S.Ct. 1697

(2005). The Ninth Circuit then issued *Belmontes* v. *Brown*, 414 F.3d 1094 (9th Cir. 2005) [*Belmontes II*], and this Court granted certiorari.

B. Guilt Phase Evidence.

Respondent's summary of the trial facts relating to the guilt determination is adapted from the opinion of the California Supreme Court, *People* v. *Belmontes*, 45 Cal.3d 744, *cert. denied*, 488 U.S. 1034 (1989).

On Sunday, March 15, 1981, the parents of 19-year-old Steacy McConnell found her beaten unconscious on the floor of her residence in Victor. She had telephoned them that same morning to advise that several people, including Domingo Vasquez, had been threatening her. Id. at 760.

McConnell died a short while later from cerebral hemorrhaging due to 15 to 20 gaping wounds to her head that cracked her skull. All wounds were consistent with having been made by the metal dumbbell bar in evidence at trial. Her residence had been burglarized. Id. at 760-761.

Belmontes, then on parole from the California Youth Authority, was spending the weekend with Bobby Bolanos in Lodi. Both knew Domingo Vasquez, who was acquainted with McConnell. During the week preceding the murder, Vasquez, Bolanos and others had "partied" at McConnell's house. Vasquez "ripped off" a quantity of amphetamine pills from her; the party ended with McConnell throwing Vasquez and his friends out of her house two days prior to the murder. Id. at 761-62.

Belmontes, Vasquez and Bolanos decided to burglarize McConnell's house, believing that she would not be home

that particular day. Vasquez's girlfriend, Carrie Lynn Rogers, testified that as the three men left her apartment to commit the burglary, Belmontes picked up a steel dumbbell bar which he carried out with him. Ibid.

Bolanos was the "wheel man" and never entered McConnell's residence. While Bolanos drove to her house, Belmontes suggested that he alone would approach the house on foot, using the metal bar if needed to force entry. Belmontes entered and Vasquesz followed him inside several minutes later.

Shortly thereafter, Belmontes and Vasquez emerged from the house carrying stereo components. Belmontes was covered with blood sprinkled on his face, pants and shoes. Vasquez "looked like he had seen a ghost." Belmontes said that he had to "take out a witness" because she was home. He explained that McConnell heard Vasquez and Bolanos drive up, and that he hit her with the bar when she looked away from him, and continued to hit her approximately 15 more times. Ibid.

The three drove to the nearby city of Galt, sold the stereo, and split the proceeds. Belmontes was arrested in Southern California six days after the murder. Blood found on the tongue of one of his shoes was tested and found to be "type O," consistent with the victim's.

Belmontes' defense was that he abandoned all intent to go through with the burglary once he knocked on the door and discovered McConnell at home. Although he struck McConnell once with the bar, it was only at Vasquez's direction and he did not intend to kill her. Vasquez must have dealt the additional fatal blows to McConnell while defendant was breaking into and searching the back rooms of the house. Id. at 763-764.

C. Penalty Phase Proceedings.

Respondent submits the following summary of the penalty proceedings drawn from the California Supreme Court opinion and from the transcript contained in the Joint Appendix (J.A.).

1. Evidence in aggravation.

At the penalty phase the prosecutor introduced evidence of (1) respondent's acquisition of a handgun in early 1979; (2) respondent's carrying the gun for protection during the same time period; (3) his April 1979 conviction as an accessory to voluntary manslaughter; (4) a domestic assault and battery involving respondent's girlfriend, Barbara Murillo, during the month preceding McConnell's murder; (5) an altercation occurring while respondent was a ward in a county youth facility; and (6) autopsy photographs depicting the nature and extent of McConnell's fatal injuries. Id. at 795.

2. Evidence in mitigation.

The defense evidence, set forth in its entirety at J.A. 5-115, described (1) respondent's difficult childhood through the testimony of his mother and his maternal grandfather, particularly regarding respondent's alcoholic and abusive father; (2) respondent's friendships during his youth with other young people who had a positive opinion of him; (3) respondent's religious study efforts during his 1979-1981 commitment to the Youth Authority, through the testimony of Youth Authority Chaplain Barrett, the testimony of the local parishioners Fred and Beverly Haro who took respondent into their home on a regular basis, and the testimony of an assistant Youth Authority chaplain;

(4) respondent's positive influence on other youths in the course of his religious activities during the Youth Authority commitment; and (5) respondent's other positive accomplishments during the Youth Authority commitment, including his earning a position of responsibility on the fire crew that patrolled the Sierra foothills.

3. The penalty arguments, instructions, and deliberations.

Following the penalty evidence, counsel and the court discussed various potential jury instructions, and eventually broached CALJIC No. 8.84.1 ["Penalty Trial Factors for Consideration"], J.A. 133. The court and counsel whittled the eleven statutory factors down to seven factors potentially applicable to this case, with statutory factor (k) renumbered as factor (g). J.A. 136.

Defense counsel then submitted one request for special jury findings as to aggravating and mitigating factors raised by the evidence, consisting of one list of potential aggravating factors, IV Clerk's Transcript (CT) 1015, and one list of potential mitigating factors, IV CT 1016-1018. The proposed mitigating factors included precisely those raised by the *Skipper* evidence.[1] *Skipper* v. *South Carolina*, 476 U.S. 1 (1986). The trial court stated that "I think it would be very helpful for us to have some

[1] Proposed mitigating factor (7) was that "[h]is ability to counsel and work with other troubled persons renders it likely that he will be able to benefit society by being allowed to live in prison and perform such work"; proposed factor (8) was that "[h]e has shown that he can live in confinement without acts of violence or any life threatening activity and thus society is protected by his imprisonment for life." IV CT 1018.

findings by the jury," but because the factors were "numerous, both in mitigation, as well as in aggravation" the proposal for two sets of special findings was denied: "Perhaps in the future that will need to be done, but at this stage I don't think we should do it as proposed." J.A. 143.

In conjunction with the request for special findings as to aggravating and mitigating factors, defense counsel requested certain additional special instructions. The court agreed to give instruction No. 1, to the effect that "[t]he fact that you have found Mr. Belmontes guilty beyond a reasonable doubt of the crime of murder in the first degree is not itself an aggravating factor." J.A. 141, 185. The court also agreed to give No. 2, which correctly informed the jury that only enumerated aggravating factors could be considered, see J.A. 141, 185-186, but it also stated that "I have previously read to you the list of aggravating circumstances which the law permits you to consider. . . ." J.A. 185. In fact, that "list of aggravating factors" was contained in the proposed special findings that the court *refused*.

Next, the court agreed to give a modified version of defendant's proposed instruction No. 3 that also referred to a prior reading of mitigating circumstances, again a reference to the proposed special findings instruction that contained separate lists of the aggravating and mitigating factors. Proposed instruction No. 3 is set forth in full below, with the parts actually given indicated by regular or bold type, and the refused portions indicated by strike-over:

> However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not

> to impose a death sentence upon Mr. Belmontes. You should pay careful attention to each of those factors. Any one of them ~~may be sufficient~~ standing alone may support a decision that death is not the appropriate punishment in this case. ~~But you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances [relating to the case or to the defendant, Mr. Belmontes] as reasons for not imposing the death sentence~~. IV CT 1022; J.A. 186.

The prosecutor's argument, J.A. 147-161, began with a reference to "this listing of aggrevating [sic] and mitigating circumstances which you are to weigh one against the other . . . ," J.A. 148, and then reviewed the seven factors that the court would subsequently instruct on, concluding with a reference to "a catchall, really a catchall, any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." J.A. 153.

In discussing the evidence that arguably fell within each factor, the prosecutor addressed respondent's evidence of religious activities in Youth Authority as follows:

> With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that the defendant's religious experience is within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.
>
> *I'm not sure it really fits in there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration.* J.A. 154 (emphasis supplied).

Having expressed his reservations that the evidence fell within any of the enumerated factors, the prosecutor proceeded to argue that in any case it should not be given much weight, that "we have to take it with a grain of salt," and "the fact that someone has religion as opposed to someone doesn't should be no grounds for either giving or withholding life." J.A. 155. The prosecutor concluded his argument with a series of rhetorical questions, including, "How do we tell the world that nothing excuses what he did?" J.A. 160.

Respondent then addressed the jury, and took responsibility for his actions:

> You've heard my parents – or my mother, my grandfather talk about my childhood, that it wasn't a very good childhood. I can't use that as a crutch to how I am right now. A lot of people have had rough childhoods and come out a lot better than I have. I realize myself that once I got old enough to know right from wrong, then it was my decision on how I wanted my life to be. So, you know, I can't really say it's on my childhood or how I was brought up or things I didn't have or things I did have. A lot of people are like that. J.A. 162.

Respondent plainly stated that "[a]s for the verdict right here that you're going to deliberate on right now, I myself would like to keep my life and not really lose it in the gas chamber." Ibid.

Defense counsel began his argument with a reference to the statutory factors, and explained to the jury:

> We've taken a moral question, a subjective question, and tried to give it objective dimensions. And I don't mean to try and give you fancy language,

> but we are trying to say, can you take all factors, A, B, C, and D, can you put them on one side and say they aggravate the circumstances or put them on one side and say they mitigate the situation and come up with a decision based upon that. And that is not easy to do, and it is not going to be easy for you to do. J.A. 165.

Defense counsel then responded to the prosecutor's remark – "I can't imagine you won't be told that the defendant's religious experience within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime," J.A. 154 – with the following rejoinder:

> I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means, *and I'm not going to insult you by telling you I think it excuses in any way what happened here. That is not the reason I asked these people to come in.* J.A. 166 (emphasis supplied).

Having disavowed any claim that the mitigating evidence "in any way" excused the crime, defense counsel continued with a description of respondent's religious awakening during his Youth Authority commitment and exposure to the M-2 program, and an observation that until that point, respondent "didn't really have the sense of values that a human being, a young man about to embark upon adulthood should have." J.A. 167. Counsel reiterated that the testimony about respondent's custodial religious experiences "does not excuse the activity," and acknowledged that "Fernando Belmontes cannot make it on the outside." Counsel contrasted respondent's experience under the Haro's guidance with respondent's experience on his own: "I think it is pretty clear from the

experience that he had inside, the kind of development he understood the kind of experience he had with the Haros as compared with his being placed out on his own." Ibid. Counsel's final plea to the jury called up the testimony of the witnesses regarding respondent's Youth Authority religious experience and urged the jury to consider their testimony with respondent's prospects in prison, "to contribute something in whatever way he can."

> The people who came in here told you about him [respondent]. They told you not only what they know of him, but they gave you, as best they could, under the difficult circumstances of somebody looking at the rest of their life in prison, a game plan, *something he can do with his life, something he's been able to do.* We're just suggesting the tip of the iceberg because who knows in 20, 30, 40, 50 years what sorts of things he can do, as he fits into the system, as he learns to set his goals, *to contribute something in whatever way he can.* J.A. 170 (emphasis supplied).

The trial court instructed the jury the following morning. Pertinent parts of the instructions are as follows:

> In determining which penalty is to be imposed on the defendant you shall consider all of the evidence which has been received during any part of the trial of this case, *except as hereafter instructed.* You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true;

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence and the expressed or implied threat to use force or violence;

(c) The presence or absence of any prior felony convictions;

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(e) Whether or not the defendant acted under extreme duress or under the substantial domination of another person;

(f) The age of the defendant;

(g) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime. J.A. 183-184 (emphasis supplied).

The court then directed the jury to "weigh the mitigating circumstances against the aggravating circumstances that you find established by the evidence," and noted that "I have previously read to you the list of aggravating circumstances which the law permits you to consider. . . ." The court explained that those enumerated factors "are the only aggravating circumstances that you may consider," but that "the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." J.A. 185-186.

This was one of the defense-proposed instructions that the trial court had agreed to give, see J.A. 142, but it had been drafted in conjunction with another defense proposed instruction that the trial court *refused*, i.e., the instruction with the *separate* list of aggravating and mitigating circumstances, J.A. 142. Because there was no instruction that contained a separate list of aggravating factors versus a list of mitigation factors, there was a potential for confusion in that the jury heard both that there was a *single* list of relevant factors (a) through (g), and also that there were separate lists of aggravating factors and mitigating factors. The jury retired to deliberate at 9:56 a.m. J.A. 188.

Just prior to the lunch break, the jury foreman posed two written questions to the court, "What happens if we cannot reach a verdict?", and "Can the majority rule on life imprisonment?". CT 1093. After the lunch break, the court responded to the questions with the jury in open court. J.A. 188-193. The court re-read a prior instruction that "in order to make a determination as to the penalty, all 12 jurors must agree, if you can." J.A. 190. Juror Hailstone followed up:

> Juror Hailstone: If we can't, Judge, what happens?
>
> The Court: I can't tell you that.
>
> Juror Wilson: That is what we wanted to know.
>
> The Court: Okay. I know what will happen, but I can't tell you what will happen.
>
> Mr. Schick: Maybe we should inquire whether the jury could reach a verdict.
>
> The Court: Do you think, Mr. Norton, you will be able to make a decision in this matter?

Juror Hailstone: Not the way it is going.

Juror Norton: That is tough, yes.

The Court: Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?

Juror Norton: I believe there is a possibility.

Juror Huckabay: We did need more time.

The Court: I think so. I think you need more time.

Yes, Mrs. Hern?

Juror Hern: The statement about the aggravation and mitigation of the circumstances, now, that was the listing?

The Court: That was the listing, yes, ma'am.

Juror Hern: Of those certain factors we were to decide one or the other and then balance the sheet?

The Court: That is right. It is a balancing process.

Mr. Meyer?

Juror Meyer: A specific question, would this be an either/or situation, not a one, if you cannot the other?

The Court: Exactly. If you can make that either/or decision. If you cannot, then I will discharge you.

> Juror Hailstone: Could I ask a question? I don't know if it is permissible. Is it possible that he could have psychiatric during this time?
>
> The Court: That is something you cannot consider in making your decision. All right?
>
> We'll ask you return them to the jury room. J.A. 190-191.

The jury continued deliberation throughout the afternoon, and was excused after 5:00 p.m., following the foreman's inquiry about obtaining a copy of the trial transcript, to which the court responded that "you could have any portion of the transcript reread to you at anytime that you wish." J.A. 192.

Later the following morning, the jury sent a note to the trial court asking for a re-read of "Fernando Belmontes's testimony and the pathologist's testimony [and] also the testimony of Bob Bolanos," J.A. 195. Upon questioning, the foreman confirmed that the jury wanted the guilt phase testimony re-read, and the court complied. At 3:34 p.m. that same day the jury returned a verdict of death. J.A. 199.

D. The Panel Majority Decision.

Belmontes II rejected all of respondent's habeas corpus claims arising from guilt and special circumstance issues, and granted relief based on the unusual combination of penalty phase instructions, questions, and arguments. The panel majority found that respondent's Eighth and Fourteenth Amendment rights were violated because the trial court's instructions failed to advise the jury to consider the portion of his mitigating evidence that tended to show that

he would adapt well if sentenced to prison and would become a constructive member of prison society. The panel majority reached this conclusion by applying *Boyde* v. *California*, 494 U.S. 370 (1989) to the record as whole. Relying on *Skipper* v. *South Carolina*, 476 U.S. 1 (1986), the panel majority found that the original jury instructions were ambiguous with respect to *Skipper's* requirement that the jury be informed that it must consider and give effect to evidence bearing on a defendant's probable future good conduct as mitigation; that "[t]he court's supplemental instructions only exacerbated this problem," 414 F.3d at 1135; and that "the trial judge's responses to the jurors' questions during the mid-deliberation colloquy had the effect of "[c]ompounding the problems with the original and supplemental instructions." Id.

SUMMARY OF ARGUMENT

Respondent's penalty presentation included substantial evidence regarding his religious studies and personal accomplishments during a Youth Authority commitment prior to the capital murder. This evidence was offered to show his likely positive institutional adjustment in prison if sentenced to life without parole. As the panel majority concluded, the standard jury instructions initially given did not, on their face, convey the impression that the jury was permitted to consider that evidence in mitigation; supplemental case-specific instructions dealing with factors in aggravation and mitigation confused the subject and afforded inadequate guidance; and the trial court's responses to jurors' questions during a mid-deliberation colloquy created as reasonable probability that the jury resolved an otherwise harmless ambiguity in the instructions by

concluding that it could not consider respondent's favorable prospects of future good conduct and positive behavior in prison as evidenced by his Youth Authority experience.

Respondent's evidence relating to his Youth Authority commitment fell squarely within the rule of *Skipper* v. *South Carolina*, supra, that a capital sentencing jury must be allowed to "consider [] a defendant's past conduct as indicative of his probable future behavior," and where warranted "draw [] favorable inferences" about the defendant's "probable future conduct if sentenced to life in prison," even though the inferences of good future adjustment "would not relate specifically to [his] culpability for the crime he committed." 476 U.S. at 4-5. But respondent's penalty jury was led to believe that evidence of this kind could not be considered in mitigation because it did not fit in the narrow definitional scope of mitigating factors that the trial court increasingly conveyed as he responded to the jurors' requests for clarification of the original instructions.

The probability that the jury understood the court's directions and applied them "in a way that prevent[ed] the consideration of constitutionally relevant evidence," *Boyde* v. *California*, 494 U.S. 370, 380 (1990) is confirmed when the arguments of counsel are considered, because both the prosecutor and defense counsel treated the Youth Authority evidence as outside the scope of California's factor (k) – relating to circumstances that "extenuate the gravity of the crime," or any other factor. The conclusion of the panel majority below that this combination of circumstances resulted in a constitutional violation was entirely consistent with *Boyde*'s teaching concerning factor (k) and was compelled by *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982),

Skipper v. *South Carolina*, 476 U.S. at 5, and *Penry* v. *Lynaugh*, 492 U.S. 302, 318-319 (1989).

ARGUMENT

I. AN UNUSUAL SERIES OF CIRCUMSTANCES AT RESPONDENT'S PENALTY TRIAL COMBINED TO CONVEY TO THE SENTENCING JURY THAT IT WAS NOT PERMITTED TO CONSIDER A SUBSTANTIAL PART OF THE MITIGATION EVIDENCE, VIOLATING THE EIGHTH AND FOURTEENTH AMENDMENTS AS THE COURT OF APPEALS HELD.

The unusual combination of respondent's particular mitigating evidence, a mixture of standard and case-specific jury instructions, and a number of mid-deliberation juror questions coupled with the trial court's improvised answers, combined to deter the jury from considering and giving effect to some of the most compelling of respondent's evidence in mitigation. The standard for relief – whether there is "a reasonable probability that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence," *Boyde*, 494 U.S. at 380 – was met in this case. The "most likely explanation," *Weeks* v. *Angelone*, 528 U.S. 225 (2000), for the jury's death verdict is that the increasingly misleading series of instructions culminated in the jury's mistaken impression that it could not consider respondent's substantial evidence of probable future good conduct and positive prison behavior as a basis for mitigating the death sentence. The factors that contributed to this unconstitutional outcome were as follows:

A. Respondent Presented *Skipper* Evidence as a Substantial Part of His Evidence in Mitigation.

Respondent presented a spectrum of mitigating evidence, including a difficult and disadvantaged background; positive conduct and relationships with peers notwithstanding his disadvantaged background; his mother's unqualified expression of affection; and his record of positive accomplishments during a Youth Authority commitment that reflected well for his future prospects for similar institutional adjustment if sentenced to life in prison. It was primarily the Youth Authority evidence – evidence that squarely came within the rule of *Skipper* v. *South Carolina* – that was the casualty of the jury instructions in this case. As noted in the Statement of Facts, while in the structured setting of the Youth Authority, respondent attained the number two position on a Youth Authority fire crew in the hot and inhospitable terrain of the foothills of the Sierras; he showed a capacity for religious and moral development under the mentorship of the sponsor family; and he reciprocated by exercising a positive influence on their teen-age son. Just as clearly as he demonstrated positive qualities while in the Youth Authority, he went downhill when released on parole. As defense counsel candidly informed the jury, "what I hope the evidence suggests to you is Fernando cannot make it on the outside," in contrast to "the experience that he had inside, the kind of development he undertook, the kind of experiences he had with the Haros as compared with his being placed out on his own." J.A. 167.

The Youth Authority evidence was an important, indeed crucial, part of respondent's presentation in mitigation, even though defense counsel candidly acknowledged,

"I'm not going to insult you by telling you I think it excuses in any way what happened here." J.A. 166. It was wrongly excluded from the jury's consideration by the subsequent developments.

B. California's Factor (k) Instruction Functions Least Effectively With Respect to Informing a Jury of Its Obligation to Consider the Mitigating Import of *Skipper* Evidence.

The penalty jury was instructed with the "unadorned factor (k) instruction," see *Boyde* v. *California*, 494 U.S. at 377, although relabeled "factor (g)" in the edited version of the penalty factors given in this case. J.A. 184. The operative language of the instruction, referring to "[a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime," does not on its face appear to encompass *Skipper* evidence that relates to the mitigating import of a defendant's likely future conduct rather than to the mitigating import of his past conduct surrounding the capital crime. However, *Skipper* makes clear that the penalty jury must be directed to consider and give effect to evidence of likely positive future conduct. *Skipper* stated that a penalty jury must "consider [] a defendant's past conduct as indicative of his probable future behavior," and where warranted "draw [] favorable inferences" about the defendant's "probable future conduct if sentenced to life in prison," even though the inferences of good future adjustment "would not relate specifically to petitioner's culpability for the crime he committed," because "such inferences would

be mitigating in the sense that they might serve as a basis for a sentence less than death." 476 U.S. at 4-5.[2]

The "extenuates the gravity of the crime" instruction is at best ambiguous as to whether it encompasses *Skipper* evidence, and at worst implicitly exclusionary of that type of evidence. *Boyde* concluded that as a general matter the instruction does an adequate job of informing the jury of the obligation to consider background and character evidence, in light of, inter alia, "the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse," 494 U.S. at 382. However, *Boyde* also noted the difference between background and character evidence on one hand, and *Skipper* evidence on the other, id. at 382, fn. 5, and it is with respect to a defendant's *Skipper* evidence that the factor (k) instruction is most problematic and troublesome.[3]

---

[2] As recently as *Tennard* v. *Dretke*, 542 U.S. 274 (2004) and *Smith* v. *Texas*, 542 U.S. 37 (2004), this Court has reaffirmed the rule of *Skipper* that a sentencing jury must be permitted to consider "evidence which is mitigating in the sense that . . . [i]t might serve as a basis for a sentence less than death" even though it has no nexus to the capital crime.

[3] Respondent does not contend that the factor (k) instruction standing alone would have an unconstitutional effect in a case where a defendant presented primarily or only *Skipper* evidence. Rather, Respondent's view is that the factor (k) instruction is sufficiently ambiguous with respect to *Skipper* evidence that it provides no affirmative assurance that a jury will understand its obligation to consider *Skipper* evidence. Respondent's argument here is that the factor (k) instruction provided *in this case* no affirmative counterweight to the demonstrably misleading instructions that followed.

C. The Trial Court's Decision to Give One of the Defense Supplemental Instructions That Contained References to Matters Addressed in Other Instructions That Were Not Given Created a Confusing Inconsistency Within the Instructions Given to the Jury.

As set forth above at pp. 5-6, the trial court gave certain instructions requested by the defense, but refused to instruct with the separate lists of aggravating and mitigating factors, in which respondent's *Skipper* evidence was explicitly referenced for consideration. The trial court did give portions of two instructions that defense counsel had proposed as follow-ups to the separate listing of aggravating and mitigating circumstances, which contained confusing references to a separate list of aggravating factors and a separate list of mitigating factors. J.A. 185-186.

As originally submitted by defense counsel, the separate list of mitigating factors referred to in this instruction was part of a set of proposed special findings that included a comprehensive list of mitigating factors that clearly described and encompassed *Skipper* evidence, and that in conjunction with the listing of aggravating factors would have provided a framework for the jury to contrast and compare the aggravation versus mitigation, and would have included express authorization to consider the Youth Authority evidence as *Skipper*-type mitigation. However, the trial court refused to give that instruction, and the only list that the jury actually heard about was the unitary CALJIC No. 8.84.1 list of combined aggravating and/or mitigating factors. The trial court's rulings had two results. First, all references were excised. Second, the trial court gave internally inconsistent instructions as to

whether there was a single list of relevant factors or separate lists of aggravating and mitigating factors. In sum, at the time the jury began deliberations, there was ample basis for confusion and uncertainty as to what the correct guidelines were for the penalty determinations.

D. The Trial Court's Impromptu Answers to the Jurors' Mid-Deliberation Questions Fatally Skewed the Resulting Death Verdict.

1. The jury's disclosure of a deep internal division.

The record shows that after deliberating for some hours, the jury sent the court two written questions, "What happens if we cannot reach a verdict?" and "Can the majority rule on life imprisonment?" IV CT 1093. The clear import of these two questions is that (1) a majority of jurors then favored life imprisonment; and (2) there was a minority contingent to the contrary. The trial court re-read a previously given instruction that concluded, "In order to make a determination as to the penalty, all 12 jurors must agree, if you can." J.A. 190. Immediately, one juror asked, "If we can't, Judge, what happens?" The court responded, "I can't tell you that." At this point, a different juror forthrightly told the court, "That is what we wanted to know."

Upon the request of defense counsel, the court asked the foreman, "Do you think, Mr. Norton, you'll be able to make a decision in this matter?" Juror Hailstone interjected, "Not the way it is going." Jury foreman Norton concurred, "That is tough, yes." J.A. 190. The court then asked if there was a possibility of making a decision with more time to discuss the matter and the opportunity to go

over instructions, to which foreman Norton answered, "I believe there's a possibility," and Juror Huckabay added "We did need more time." J.A. 190.

What this colloquy reflects is a substantially divided jury with a life-leaning majority, a death-leaning minority, and pessimism about the prospect of a verdict.

2. Juror Hern's initiative to clarify and simplify the penalty decision.

Juror Hern's questions, phrased in plain English, demonstrate that she sought confirmation that the decision-making process was to be focused on the list of seven factors. Her questions reflect a single focus on the factors, without any reference to the evidence presented.

Her first question, "The statement about the aggrevation [sic] and mitagation [sic] of the circumstances, now, that was the listing?" J.A. 191, refers to the penalty phase factors as a "listing," echoing the trial court's use of the term in the previously given instructions ["I have previously read to you the list of aggravating circumstances which the law permits you to consider. . . ." J.A. 185] A "list" is a catalogue or series of items, and any particular item is either on a list or not. The question may well have been intended to clarify confusion from the conflicts in the initial instructions, where one instruction enumerated a *single* list of factors, while other instructions referred to separate lists of aggravating and mitigating factors.

This question was in the form of a "declarative question," a statement with an interrogatory ending. People ask questions in this form when they have an anticipated or desired answer in mind and want confirmation of that

answer. (In legal parlance, this type of question is often called a "leading question"). Ms. Hern sought confirmation that the list of factors (a) through (g) comprised the specific list of reference points for the penalty determination. Implicit in the form of her question is the premise that the "listing" was specific and finite.

Next, she asked, "Of those certain factors, we were to decide one or the other and then balance the sheet?" This is another declarative question, seeking *confirmation* of the assertion contained in the question, not an open-ended request for information. Second, it demonstrates a further effort by Juror Hern to confirm specifically that there was a circumscribed and finite number of permissible factors to consider. The clear import is that Juror Hern wanted confirmation that the list of factors the jury had heard was complete and exhaustive. The trial court gave her and the entire jury exactly that confirmation without any countervailing direction that all the evidence presented was proper for consideration, and that the list of factors was supplied only to *help* the jury consider the evidence, *not* to *limit* the jury's consideration. The colloquy conveyed that the penalty determination was to be focused on the seven listed factors, *not* on the evidence except as it fell within a listed factor. The trial court had every opportunity to emphasize that while the jury could consider the seven specific factors, albeit only as guide posts, it had to consider *all* the *evidence* under one or more of those factors, but the court failed to do so.

Third, Juror Hern employed a frequently used accounting term to characterize the jury's decision-making process, i.e., to "balance the sheet." The clear implication of this usage is to emphasize that the decision-making process is objective and mechanical. When an accountant

balances the sheet for a client, there is no room for subjectivity as to the bottom line once the income and expense items have been duly entered, i.e., the client is either in the black, in the red, or breaking even. Translated into the capital sentencing context, Juror Hern's question and the trial court's response confirmed that the jury's task was to enter the aggravating or mitigating valence as to each of the specified factors, and then balance the sheet to determine whether Belmontes was either in the black (life verdict); in the red (death verdict) or breaking even (unspecified). This interchange again conveyed that the jury was to focus on the seven factors, not on the comparative weight of the underlying evidence.

The trial court confirmed that there was a single and specific list, "That was the listing, yes, ma'am." The trial court similarly confirmed her view of the penalty decision-making as akin to working a spreadsheet, "That is right. It is a balancing process."

The trial court had a golden opportunity to answer Juror Hern's question – "now, that was the listing?" – in a manner that accurately and correctly informed the jurors of the breadth of evidence they were obligated to consider. The court could have drawn on the defense special instruction previously given, "the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or death sentence upon Mr. Belmontes," J.A. 186, or even better, on that portion of defense special instruction 3 previously refused – "you should not limit your consideration of mitigating circumstances to these specific factors. You may also consider any other circumstances

[relating to the case or to the defendant, Mr. Belmontes] as reasons for not imposing the death sentence." IV CT 1014.

The trial court missed this last clear chance to direct the penalty jury to consider respondent's *Skipper* evidence, even though there were proper instructional formulations readily available. The proposed defense instructions that the court refused are virtually identical precursors to the instruction currently given to Texas capital sentencing juries in response to this Court's *Penry* decisions. See *Penry* v. *Johnson*, 532 U.S. 782, 803 (2001) [*Penry II*] ("Texas now requires the jury to decide 'whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.'"). Just as with the Texas trial court that erroneously instructed the sentencing jury in *Penry II*, the trial court in this case "had adequate alternatives available to it" as it responded to the jurors' mid-deliberation questions, but failed to avail itself of those constitutionally correct alternatives. Ibid.

3. The trial court's directive not to consider the matter of concern raised by Juror Hailstone's inquiry.

Immediately after the trial court gave unqualified confirmation in response to Juror Hern's questions that the jury was to consider only specified statutory factors, Juror Hailstone broached the subject of *non*-statutory factors and asked a question that *directly* raised an issue relating to respondent's future prison adjustment if sentenced to life – "Is it possible that he could have psychiatric treatment

during this time?" The trial court responded with a direct order *not* to consider that – "That is something you cannot consider in making your decision," J.A. 191 – without any explanation that non-statutory factors were *essential* for consideration if supported by the evidence, and that the *only* reason that the court was directing the jury not to consider the prospects for psychiatric treatment was that the parties had not presented evidence on that particular issue.

The clear message to the jury was that the jury could *only consider* the specifically listed factors as confirmed by the court's answer to Juror Hern's question, but could *not* consider other unlisted factors because unlisted factors were outside the legal rules for decision-making, i.e., out of bounds for juror consideration.

As the jurors continued their deliberations, they must have understood that their task had been considerably simplified. Rather than having to concern themselves with subjective issues of possible future adjustment in prison, the jury could focus on the specifically designated aggravating and mitigating factors and make their decision limited to those factors.

Based on the trial court's diametrically opposite responses to Juror Hern's questions versus Juror Hailstone's, the jury would have gotten the message that to be considered in the penalty determination, the evidence *had* to qualify as an enumerated factor or it was out of bounds.

In sum, the trial court's contrasting responses to Juror Hern's and Juror Hailstone's questions transformed the list of statutory factors from a helpful guideline that "only points the sentencer to a subject matter," into a "factor [that] ... require[s] a yes or no answer to a specific question," *Tuilaepa*

v. *California*, 512 U.S. 967 (1994), and *not* point the sentencer to the *Skipper* subject matter.

E. The Arguments of Counsel Reinforced the Erroneous View that Respondent's *Skipper* Evidence Did Not Fall Within Factor (k) or Any Other Factor.

The closing penalty arguments to the jury reveal a back and forth dialogue between the prosecutor and defense counsel in which both of them treated respondent's good prison adjustment evidence as *not* falling within the scope of factor (k) and *not* extenuating the gravity of the crime.

1. The prosecutor's acknowledgment that respondent's *Skipper* evidence did not fall within the enumerated instructional factors.

The prosecutor's argument included a segment in which he enumerated the penalty facts, (a) through (g) in this case, and then gave the jury his views on whether the penalty evidence qualified for consideration under the factors. The prosecutor went through (a) the circumstances of the offense; (b) other criminal conduct; (c) prior felony conviction; (d) mental or emotional disturbance; (e) duress; (f) age of the defendant; and (g) "any other circumstance which extenuates the gravity of the crime, even though it is not a legal excuse for the crime." J.A. 152-153.

Regarding the last factor, the prosecutor expressed his reservations whether the evidence of respondent's religious conversion while incarcerated fell within *any* of the enumerated statutory mitigating factors:

> All right. With respect to these others, I suspect that you will be told – I can't imagine that you won't be told that defendant's religious experience is within the *catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime.*
>
> *I'm not sure it really fits there. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration."* J.A. 154 (emphasis supplied).

This passage epitomizes the constitutionally unacceptable "mixed signals" as to the import of the mitigating evidence condemned in, inter alia, *Penry* v. *Johnson*, 532 U.S. at 802 (reversing death sentence because of internally contradictory and unclear instructions regarding sentencing responsibility). The prosecutor expressly questioned whether respondent's evidence of his custodial religious experience as indicative of good future behavior fell within any of the enumerated factors – "I'm not sure it really fits in any of them." J.A. 154. Thus, the prosecutor pointed out and focused the jury's attention on the language of factor (k) and the disjuncture between the enumerated factors and the mitigating evidence presented. The prosecutor proceeded to provide his views on how the evidence of respondent's religious experience should be viewed in the penalty determination, *independent* of any enumerated factor.

2. Defense counsel's concession that respondent's *Skipper* evidence did not extenuate the gravity of the crime.

Defense counsel responded directly to the prosecutor's comment that "I can't image that you won't be told that

the defendant's religious experience is within that catchall that relates to the defendant at the time he committed the crime, extenuates the gravity of the crime," J.A. 154, and counsel expressly disavowed any intention to argue that the mitigation evidence "excuses in any way what happened here," J.A. 166: "I'd like to comment about the evidence that we've presented and what Mr. Sueyres told you he thought it means *and I'm not going to insult you by telling you I think it excuses in any way what happened here*," because "that is not the reason I asked these people to come in." J.A. 166 (emphasis supplied).

Defense counsel was responding to the prosecutor's argument, and was apparently trying to gain credibility with the jury by disavowing any effort to shoehorn the future good conduct evidence into the ill-fitting or non-fitting extenuate-the-gravity-of-the-crime container. Counsel's tactical concession reinforced the jury's confusion and uncertainty whether the evidence of future good institutional adjustment was cognizable under the enumerated factors. Neither counsel contended that it *did* fit within any factor; rather, the prosecutor expressed doubt that it fit in anywhere, and defense expressly conceded that it did *not*. Both counsel did comment on the import of the evidence, without any attempt to tether it to a particular factor. The arguments of counsel that respondent's evidence of custodial religious experience did not fall within any enumerated factor likely caused the jury to view it with suspicion and skepticism, and then to disregard it when the trial court instructed the following day, "You must accept and follow the rules of law as I state them to you." J.A. 175. That evidence did not fall within the rules of law as stated by the trial court.

The comments of counsel underscored, as in *Penry* v. *Johnson*, 532 U.S. at 802, that the jurors would have had to *violate* their oath to give effect to the non-statutory portions of respondent's mitigation. *Penry* granted habeas corpus relief because of conflicting and misleading jury instructions, whose problems were compounded by arguments of counsel because counsel's "explanation only reminded the jurors that they had to answer the special issues *dis*honestly in order to give effect to Penry's mitigating evidence." Ibid.

F. The Jury's Subsequent Questions Confirming the Improperly Restrictive Consideration of Mitigating Evidence.

The subsequent questions asked by the jurors provide confirmation that they were diverted from the mitigation evidence of future institutional adjustment and re-focused on the circumstances of the crime, narrowly defined. On the day following the interchange regarding deadlock, the jury asked for certain testimony to be read, including respondent's testimony from the *guilt phase*, the pathologist's testimony from the *guilt phase*, and Bob Bolanos' testimony from the *guilt phase, all focused on the circumstances of the crime itself*. It is certainly a strong indication that the jurors believed that they were directed to consider the circumstances of the crime as the primary decision-making factor. After rehearing testimony of the ugly circumstances of the crime itself and without any further reference to the penalty phase evidence, the jury returned a death verdict. The trial court's responses to the juror's questions had refocused them on the crime and away from the primary mitigating evidence.

G. The Mutually Reinforcing Effects of the Instructions and Argument.

This is a case in which a number of case-specific factors contributed to the unconstitutional verdict, rather than a single instructional deficiency as in *Penry* v. *Lynaugh*, 492 U.S. at 322 ("Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment. We agree."). Rather, this case falls more within the type of combination constitutional deficiency that required relief in, inter alia, *Penry* v. *Johnson*, 532 U.S. at 804, in which a supplemental instruction was given in addition to the deficient instruction of *Penry I*, but which did not cure the problem: "Although the supplemental instruction made mention of mitigating evidence, the mechanism it purported to create for the jurors to give effect to that evidence was ineffective and illogical" and "[t]he comments of the court and counsel accomplished little by way of clarification." Ibid.

Here, the jury began its deliberations without any extrinsically imposed constraints on its consideration of evidence, and when the internal debate was expansive, a majority of jurors favored a life verdict. However, when the trial court confirmed in response to Juror Hern's questions that the deliberations were to be confined to the list of factors, and when the court flatly rebuffed Juror Hailstone's inquiry regarding consideration of non-statutory matters, the decisional framework unconstitutionally favored a death verdict.

The jury would have been deterred from considering and giving effect to respondent's evidence of prospective institutional adjustment for a number of reasons. First, it does not fit within any natural reading of any of the seven enumerated factors, as the prosecutor pointed out to the jury. Thus, the jury received very "mixed signals," *Penry II*, 532 U.S. at 802, from the prosecutor himself as to whether respondent's evidence properly fell within the catchall factor or within *any* permissible factor. J.A. 186.

Next, defense counsel's response to the prosecutor's argument was an express disavowal that respondent's evidence "excuses *in any way* what happened here." J.A. 166 (emphasis supplied). While counsel used the word "excuse" rather than "extenuate," the two words are often used interchangeably, see *Boyde*, 494 U.S. at 382 ("Petitioner had an opportunity through factor (k) to argue that his background and character 'extenuated' or 'excused' the seriousness of the crime, and we see no reason to believe that reasonable jurors would resist the view, 'long held by society,' that in an appropriate case such evidence would counsel imposition of a sentence less than death"). Most importantly, once the jury saw that defense counsel could not even muster an effort to claim that the *Skipper* evidence was cognizable under any of the listed factors, the jury would all too likely have viewed that evidence and the accompanying argument as a well-meaning but unavailing effort to appeal to the jury on matters that were not authorized for consideration, just as Juror Hailstone's concerns about psychiatric treatment, which the trial court expressly told the jury were not permitted for consideration.

The jury was given a clear directive that some matters were proper for consideration and that others were not.

Juror Hern's question elicited an unreserved judicial affirmation that the specified factors were to be the jurors' focus, without any accompanying exhortation that all of respondent's evidence had to be at least *considered* under the "extenuate-the-gravity-of-the-crime" factor. Juror Hailstone's question elicited an equally unequivocal judicial admonition that the subject matter of her question – the possibility of psychiatric treatment – was out of bounds and off limits. The jury resumed deliberations with a clear understanding that some matters were approved for consideration, specifically the enumerated factors, while others were out of bounds and off limits, and with the only specific guidance as to where respondent's *Skipper* evidence fell coming from the arguments of counsel and treating it as outside the scope of the enumerated factors.

In sum, the jury returned to deliberations with very mixed signals emanating from the evidence, the instructions, and the arguments presented. Some of respondent's evidence fell within the deprived childhood type of character evidence that would likely be viewed as mitigating evidence as described in *Boyde*, but other equally or more important parts of respondent's evidence just did not fit within the "gravity of the crime" factor, or any other factor, under any natural reading of the instruction and in light of defense counsel's candid disavowal that it in any way excused the crime.

The jury had to reconcile these mixed signals. On one hand, both attorneys treated the *Skipper* evidence as falling outside the scope of the enumerated factors, but nonetheless gave their respective views to the jury as to how it should be viewed in the penalty decision. On the other hand, the trial court instructed the jury that "[y]ou

must accept and follow the rules of law as I state them to you." J.A. 175. Under these circumstances, there is a strong likelihood that the jury gave predominant weight to the court's final instructions to hew to the enumerated factors, accepted counsels' consensus that respondent's evidence of positive prospects for institutional judgment did *not* fall within any legally cognizable factor, and rejected counsels' invitation to bend the rules and consider evidence that was apparently as far out of bounds as was Juror Hailstone's concern about custodial psychiatric treatment.

This incorrect view of the sentencing framework best explains why the jury's only subsequent question related to guilt phase evidence regarding the crime itself, and why the majority of life-leaning jurors voted for death the following day. Under the simplified decision-making framework that the trial court approved during the mid-deliberation colloquy, the jury likely felt obligated not to consider and weigh respondent's evidence of Youth Authority religious experience as a predictor of positive future institutional judgment. The jury would likely have viewed defense counsel's heartfelt argument regarding respondent's Youth Authority experience, conspicuously untethered to any statutory factor, as a well-meaning but unauthorized invitation to look outside of the permissible rules – as reaffirmed in mid-deliberation by the trial court – that constrained their decision.

This case is not like *Boyde* or *Brown* v. *Payton*, 544 U.S. 133 (2005), in which the jurors could have been misled by the instructions only if they viewed the entire penalty defense as a "charade." Here, respondent's evidence fell within a number of mitigation categories, some of which would likely be given due consideration under the

view described in *Boyde* that a hard lot early in life mitigates bad conduct later in life. However, what made respondent Belmontes *different* from the countless capital defendants with sorry stories of deprived childhoods is that when he was committed to an institutional setting with internal structure and clearly prescribed goals, *he shaped up*. His death verdict was unconstitutional because his jury was all too likely deterred from considering his positive prospects for institutional adjustment as an extension of his admirable adaptation to the Youth Authority as a reason for voting life.

This unusual combination of events resulted in a violation of respondent's Eighth and Fourteenth Amendment rights. "Evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and "[u]nder *Eddings*, such evidence may not be excluded from the sentencer's consideration." *Skipper*, supra, 476 U.S. at 5. Accord: *Penry* v. *Lynaugh*, 492 U.S. at 325.

II. THE STATE'S ARGUMENTS SEEKING TO AVOID THE CONCLUSION OF THE NINTH CIRCUIT PANEL AND CRITICIZING THE PANEL DECISION ARE MERITLESS.

A. The State's Untenable Claim of a Conflict Between the Panel Majority Opinion and this Court's *Boyde* Jurisprudence.

The State argues that a conflict exists between the Ninth Circuit majority panel decision and this Court's *Boyde* jurisprudence. The two decisions are entirely complementary.

1. The import of *Boyde*.

Boyde held that California's unadorned factor (k) instruction generally permits the jury to consider background and character evidence of various types as mitigation evidence.

However, nothing in the *Boyde* majority opinion asserts that the unadorned factor (k) instruction is an exemplary, much less foolproof, means of informing a penalty jury of its sentencing responsibilities. *Boyde* concluded that factor (k) performed an adequate job of directing the jury to consider background and character evidence, but there is a latent ambiguity in factor (k) when institutional adjustment evidence is presented.

There is a legitimate and logical perspective that certain types of constitutionally compelled mitigating evidence, e.g., evidence relating to future positive prison adjustment, do *not* extenuate the gravity of the capital crime and, therefore, are not authorized for consideration under factor (k). In fact, it could very well be viewed as insensitive, if not insulting, for a defense attorney to argue that these types of mitigation "extenuated the gravity of the crime." Defense counsel *in this case* expressly informed the jury that he would not "insult" them by arguing that the Youth Authority evidence "excuses in any way what happened here." J.A. 166; see Part II-C-2, below.

Boyde was based on a *probabilistic* assessment of the *likely* effect of an unadorned factor (k) instruction, and did not purport to vouch for the efficacy of the instruction in all situations.

2. The panel's reference to the *Boyde* distinction between background and character evidence versus future institutional adjustment evidence.

The Ninth Circuit simply noted a point previously made in *Skipper* v. *South Carolina*, i.e., that a penalty jury must "consider [] a defendant's past conduct as indicative of his probable future behavior," and where warranted "draw [] favorable inferences" about the defendant's "probable future conduct if sentenced to life in prison," 476 U.S. at 4-5, even though the inferences of good future adjustment "would not relate specifically to petitioner's culpability for the crime he committed," because "such inferences would be mitigating in the sense that they might serve as a basis for a sentence less than death." Id. The Ninth Circuit, recognizing that much of respondent's mitigating evidence fell within the rubric of *Skipper*, rather than within the more traditional "background and character" type of evidence addressed in *Boyde*, concluded that "[a]t the least, the unadorned factor (k) instruction is ambiguous with respect to *Skipper's* requirement that the jury be permitted to consider and give effect to evidence bearing on defendant's probable future good conduct when it decides whether to impose the death penalty, see 476 U.S. at 5, and thus with respect to the jury's right to consider Belmontes' most important mitigating evidence." Panel Opinion, Appendix 295a.

It is readily apparent that the panel opinion took no contrary or incompatible position with respect to *Boyde*, but rather recognized this Court's own differentiation between the nature of the evidence offered in *Boyde* versus the nature of evidence offered in *Skipper*. The panel's view

faithfully tracks this Court's differentiation of the two types of evidence as set forth in *Boyde* itself:

> In *Skipper*, we held that a capital defendant must be permitted to introduce in mitigation evidence of post crime good prison behavior to show that he would not pose a danger to the prison community if sentenced to life imprisonment rather than death. The testimony that petitioner [Boyde] had won a dance contest while in prison, however, was introduced not to demonstrate that he was a 'model prisoner' like Skipper and therefore unlikely to present a risk of future dangerous, but to show that he had artistic ability" as part of Boyde's "overall strategy to portray himself as less culpable than other defendants due to his disadvantaged background and character strengths in the face of those difficulties. *Boyde*, 494 U.S. at 382, fn. 5.

This Court recognized that Boyde's evidence of dancing ability was presented to and could have been considered by the penalty jury under the factor (k) instruction with respect to positive background and character evidence, but specifically noted that the evidence was *not* offered as a prognosticator of good future prison adjustment, and offered no opinion as to whether the factor (k) instruction was adequate, ambiguous, or deficient with respect to evidence supporting an inference of positive future conduct.

The State argues that either no such distinction was made in *Boyde* or alternatively, that any such distinction is erroneous. Petitioner's Brief (P.B.) 23-24. However, this Court has not so held, and the panel majority did no more than recognize that the Court has not resolved that issue. That view is an accurate assessment of this Court's case

law, and does not demonstrate a tension or conflict between this Court's jurisprudence and the panel majority. The panel majority can hardly be pilloried for recognizing a distinction made by this Court.

B. Other Deficiencies in the State's Arguments Regarding the Case-Specific Factors Relied on by the Panel Majority.

1. The State's failure to recognize the confusing instructions given by the trial court that conflicted with the factor (k) instruction.

Petitioner fails to acknowledge the inherent ambiguity and confusion in the pre-deliberation instructions. The trial court first instructed with a unitary list of relevant factors authorized by California Penal Code § 190.3, but obviously did not categorize them as either aggravating or mitigating. J.A. 183-184. The court then told the jury that it had "previously read to you the list of aggravating circumstances which the laws permits you to consider . . . ," J.A. 185, but in fact there had *not* been any reading of a separate list of aggravating factors. The court continued, "However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes." J.A. 186. There was never any designation of a separate list of mitigating factors, or even a specification of which factors within the unitary list were mitigating, either illustrative or exhaustive. The prosecutor argued that the factors in the unitary list "are either aggravation or mitigation as you find them

to be," J.A. 153, and that, for example, "the age of the defendant goes both ways," J.A. 154.

This jury was not given two lists of factors as in other states, e.g., Florida, see *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), where one is clearly designated as aggravating, and the other designated as mitigating, but the jury was *told* that there *were* two lists, which must have been confusing, and which as noted above was the result of the trial court's decision to give some, but not all, the defense proffered special instructions. The defense had *proffered* separate lists of aggravating and mitigating factors, but the trial court declined to provide these to the jury, while delivering an instruction that *referred* to these separate lists. That anomaly was a likely cause of jury confusion, and explains Juror Hern's quest for clarity that there was actually one list, and "Of those certain factors, we are to decide one or the other and then balance the sheet?" J.A. 191.

2. The State's incorrect assertion that during the mid-deliberation colloquy the trial court directed the jury to go over the original instructions.

Petitioner suggests that any potentially untoward consequences of the mid-deliberation colloquy were ameliorated because "during this same informal conference with the jurors, the court directed them to 'go over the instructions again with one another.' J.A. 190." P.B. 38. In fact, the court made no such directive.

Rather, after the jury reported serious disagreement and foreman Norton remarked that it was tough going, the trial court *asked* the jury, "Do you think if I would allow

you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" J.A. 190. That judicial *query* was the *only* reference to the prior instructions during the entire mid-deliberation colloquy, and was followed by a flurry of direct questions and answers. That single reference to prior instructions as a *possible* aid to further deliberations can in no way fairly be characterized as a *directive* to review the prior instructions.

What actually happened was that after the inquiry about the possibility of reviewing the preceding instructions, various jurors asked specific questions about the decision-making framework that reflected the failure of the prior instructions to convey a clear understanding of the framework. Because there was no directive to review the prior instructions, petitioner's claim that "[t]he trial court's directive to review the previous instructions would have cured any possible confusion," P.B. 38, citing *Weeks* v. *Angelone*, 520 U.S. 225, is untenable.

The trial court in *Weeks* did the *opposite* of what the trial court did in this case. The *Weeks* jury asked, "If we believe that Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives, then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?" The trial court commented to counsel that "I don't believe I can answer the question any clearer than the instruction [originally given]," id. at 229, and then re-read verbatim "the instruction that [this Court] upheld in *Buchanan* v. *Angelone*, 522 U.S. 269, 139 L. Ed. 2d 7002, 118 S.Ct. 757 (1998), as being sufficient to allow the jury to consider mitigating evidence." Id. at 231.

Weeks then noted that following this re-instruction, the jury deliberated without further questions before returning a death verdict; based on the available indicia of what occurred, this Court found that "*the most likely explanation* is that the jury was doing exactly what it was instructed to do: that is, weighing the mitigating circumstances against the aggravating circumstance." Id. at 235 (emphasis supplied).

In this case, the "most likely explanation of what occurred" is that the jury returned to the jury room, followed Juror Hern's simplified framework as confirmed by the court, lopped off from consideration respondent's evidence of Youth Authority religious experience as outside the boundaries of the enumerated factors, and returned a death verdict without considering and weighing respondent's *Skipper* evidence in mitigation.

3. The State's untenable claim that the jurors' questions show mere conscientiousness rather than confusion.

Petitioner argues that "[a]s Judge Callahan understood in a way the panel majority failed to see, these juror inquiries do not necessarily establish any jury confusion but rather 'just as easily that the jury was taking its duty seriously before reaching a verdict,'" P.B. 38, referring to Judge Callahan's dissent from the Order Denying Rehearing En Banc. This is a complete non sequitur.

Any conscientious juror deliberating in a penalty trial who was in fact "taking [his or her] duty seriously" *would* ask questions of the judge when there was confusion, uncertainty, or disagreement as to the applicable legal standards. Jurors who were *not* taking their duty seriously

would not take the trouble to ask questions to eliminate confusion, uncertainty or disagreement, but would simply shrug "whatever" and take the path of least resistance.

Respondent *presumes* that all jurors were taking their duty seriously, but the more conscientious the jurors were, the more likely they would ask questions because they were confused about the correct decision-making framework, and the more likely that they would faithfully follow instructions that purported to clarify the cause of confusion.

Finally, notwithstanding Judge Callahan's admonition that "[a]ppellate courts should not speculate why a juror asked a particular question," P.A. 92, this Court has repeatedly and realistically reviewed the context of juror questions to determine the "most likely explanation," *Weeks*, 528 U.S. at 235, of what the jury was actually doing. *Shafer* v. *South Carolina*, 532 U.S. 36 (2001) ("Shafer's jury left no doubt about its failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means"); *Simmons* v. *South Carolina*, 512 U.S. 154, 178 (1994) ("[T]hat the jury in this case felt compelled to ask whether parole was available shows that the jurors did not know whether or not a life-sentenced defendant will be released from prison"); *Bollenbach* v. *United States*, 326 U.S. 607, 612-613 (1946). The "most likely explanation" in this case is that the initial and internally contradictory instructions caused confusion among a sharply divided jury; jury Hern sought confirmation of a simplified and objective decision-making framework; the trial court unreservedly confirmed her proffered model; and under that framework the life-leaning jurors could not give mitigating effect to respondent's evidence of good prospective institutional adjustment.

4. The State fails to acknowledge that the mid-deliberation instructions provided the framework in which the jury actually reached its penalty decision.

The state's position regarding the mid-deliberation colloquy is cursory and fails to acknowledge that this Court has long recognized the paramount importance appropriately accorded to mid-deliberation jury instructions in determining the actual decision-making basis that the jury relied on. *Bollenbach* v. *United States*, 326 U.S. at 612 ("Particularly in a criminal trial, the judge's last word is apt to be the decisive word," and "[i]f it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge").

The federal appellate courts applying *Bollenbach* have confirmed the special emphasis that jurors place on mid-deliberation instructions. *Arroyo* v. *Jones*, 685 F.2d 35, 39 (2d Cir. 1982) (mid-deliberation instructions "enjoy special prominence in the minds of jurors" because they are "freshest in their minds," "isolated from the other instructions they have heard," "received by the jurors with heightened alertness," and "generally have been given in response to a question from the jury"), cert. denied, 459 U.S. 1048, 74 L. Ed. 2d 617, 103 S. Ct. 468 (1982). The trial court's unreserved confirmation of Juror Hern's simplified decision-making framework, apparent from the face of the colloquy and confirmed by the context and subsequent conduct of the jury antecedent to its death verdict, confirms that the death verdict was unconstitutionally rendered. See *Penry* v. *Johnson*, 532 U.S. at 804 ("Any realistic assessment of the manner in which the supplemental instruction operated would therefore lead to

the same conclusion we reached in Penry I: '[A] reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence' "); *Hitchcock* v. *Dugger*, 491 U.S. at 398-99.

III. THE STATE HAS DISTORTED THE PANEL'S DECISION IN CLAIMING A *TEAGUE* VIOLATION.

The State is correct that respondent's judgment became final on January 17, 1989, when this Court denied certiorari on his direct appeal, P.B. 42, but the controlling authority that governs the outcome of this case had long been decided in the form of *Lockett* v. *Ohio*, 438 U.S. 586 (1978), as explained in *Hitchcock* v. *Dugger*, and other cases. Respondent has *always* relied on the controlling precedent of this Court with respect to this claim. In the Petition for Writ of Certiorari filed in November 1988 following the affirmance of the death judgment by the California Supreme Court, respondent's question 2 was as follows:

> Whether the trial court's penalty phase instructions, including both those based on the sentencing statute as well as those given extemporaneously in response to a jury question, improperly curtained the jury's consideration of mitigating evidence and skewed the jury's determination toward death in violation of the Eighth and Fourteenth Amendments.

Respondent expressly relied on settled law, including *Mills* v. *Maryland*, 486 U.S. 367, 384 (1988) ("The possibility that a single juror could block [] consideration [of all mitigating evidence], and consequently require the jury to

impose the death penalty, is one we dare not risk"), *Eddings* v. *Oklahoma*, 455 U.S. 104, 119 (1982) and *Hitchcock* v. *Dugger*. See Petition for Writ of Certiorari, pp. 9-11. Hitchcock specifically granted relief in 1987 because of an instructional barrier to giving mitigating weight to "capacity for rehabilitation," 481 U.S. at 399. Petitioner appropriately refers to the "*Lockett* line of cases," including *Hitchcock*, P.B. 44, but argues that "[c]onsistent with *Lockett* and its progeny, Belmontes was allowed to present in mitigation whatever relevant background and character evidence he wished." That is true but irrelevant. Both defendants Hitchcock and Penry were permitted to present whatever relevant background and character evidence they wished, but nonetheless obtained relief from this Court because the accompanying instructions interfered with the sentencer giving effect to the evidence. The penal decision in no way extended the reach of this Court's cases. The basic constitutional principle relied on by the Ninth Circuit was that the "Eighth Amendment requires that a capital jury consider all relevant mitigating evidence offered by the defendant and afford it such weight as it deems appropriate," 414 F.3d at 1131, a well-settled principle that long pre-dated the decision of the California Supreme Court in 1989.

Petitioner cites and relies on *O'Dell* v. *Netherland*, 521 U.S. 151, 157 (1997), but that case supports respondent's position. O'Dell's death sentence was final in 1988, and he subsequently petitioned for habeas corpus relief in reliance on *Simmons* v. *South Carolina*, 512 U.S. 154. In response to a *Teague* objection, *Teague* v. *Lane*, 489 U.S. 288 (1989), O'Dell argued that *Simmons* was dictated by *Skipper* v. *South Carolina*. O'Dell lost because *Simmons* established a new rule that an instruction must be given

as to what would happen to the defendant under state law after a sentence was imposed, while *Skipper* confirmed the pre-existing rule that "[e]vidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating," and that "[u]nder *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), such evidence may not be excluded from the sentencer's consideration." *Skipper*, 476 U.S. at 5.

That is exactly the rule that respondent invokes here and under which the panel majority granted relief.

The same rule required relief in *Penry* v. *Lynaugh*:

> Penry argues that those assurances were not fulfilled in his particular case because, without appropriate instructions, the jury could not fully consider and give effect to the mitigating evidence of his mental retardation and abused childhood in rendering its sentencing decision. *The rule Penry seeks – that when such mitigating evidence is presented, Texas juries must, upon request, be given jury instructions that make it possible for them to give effect to that mitigating evidence in determining whether the death penalty should be imposed – is not a "new rule" under Teague because it is dictated by Eddings and Lockett.* Moreover, in light of the assurances upon which *Jurek* was based, we conclude that the relief Penry seeks does not "impos[e] a new obligation" on the State of Texas. *Teague*, 489 U.S. at 301, 492 U.S. at 318-319 (emphasis supplied).

The Ninth Circuit panel majority opinion applied the rule of *Eddings* and *Lockett* in a straightforward manner.

CONCLUSION

Wherefore, for the foregoing reasons, respondent respectfully requests that this Court affirm the judgment of the Ninth Circuit.

Dated: August 7, 2006

Respectfully submitted,

ERIC MULTHAUP
CHRISTOPHER H. WING
Attorneys for Respondent
Fernando Belmontes

443

(9)

CORRECTED

No. 05-493

FILED

SEP 11 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

v.

FERNANDO BELMONTES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONER

BILL LOCKYER
Attorney General of the State of California
MARY JO GRAVES
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
ERIC L. CHRISTOFFERSEN
Assistant Supervising Deputy Attorney General
MARK A. JOHNSON
Assistant Supervising Deputy Attorney General
State Bar No. 179141
Counsel of Record
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, CA 94244-2550
Telephone: (916) 322-5437
Fax: (916) 324-2960
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

I. THERE IS NO REASONABLE LIKELIHOOD THAT BELMONTES' JURORS MISAPPLIED ANY OF THE INSTRUCTIONS TO PREVENT CONSIDERATION OF ANY CONSTITUTIONALLY RELEVANT EVIDENCE 1

A. Neither The Prosecutor Nor Defense Counsel Argued That Belmontes' Mitigation Evidence Could Not Be Considered Under The Factor (k) Instruction 2

B. The Court's Special Instruction Only Reinforced The Availability Of The Defense Mitigation Evidence For The Jurors' Consideration 5

C. There Is No Reasonable Likelihood That The Trial Court's Answers To Juror Questions Caused Any Confusion About The Permissible Scope Of Mitigating Evidence 8

D. The Jurors' Requests To Have Testimony Re-Read Reveal No Confusion About The Permissible Scope Of Mitigating Evidence 14

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989) 16

CONCLUSION 19

TABLE OF AUTHORITIES

Page

CASES

Belmontes v. *California*, 488 U.S. 1034 (1989) 17

Bollenbach v. *United States*, 326 U.S. 607 (1946)..... 14

Boyde v. *California*, 494 U.S. 370 (1990).....1, 15, 16, 18, 19

Brown v. *Payton*, 544 U.S. 133 (2005)..... 16, 18

Donnelly v. *DeChristoforo*, 416 U.S. 637 (1974)..... 3

Eddings v. *Oklahoma*, 455 U.S. 104 (1982) 17

Hitchcock v. *Dugger*, 481 U.S. 393 (1987)..... 16, 17

Johnson v. *Texas*, 509 U.S. 350 (1993)..... 12, 14, 18

Jones v. *United States*, 527 U.S. 373 (1999) 9

Lambrix v. *Singletary*, 520 U.S. 518 (1997)..... 19

Lockett v. *Ohio*, 438 U.S. 586 (1978) 17

Penry v. *Lynaugh*, 492 U.S. 302 (1989)..... 16, 17

People v. *Boyd*, 38 Cal.3d 762, 700 P.2d 782, 215 Cal.Rptr. 1 (1985) 18

People v. *Kimble*, 44 Cal.3d 480, 749 P.2d 803, 244 Cal.Rptr. 148 (1988) 9

Skipper v. *South Carolina*, 476 U.S. 1 (1986)..... 17

Teague v. *Lane*, 489 U.S. 288 (1989) 1, 16, 19

Tuilaepa v. *California*, 512 U.S 967 (1994)..... 6

Weeks v. *Angelone*, 528 U.S. 225 (2000) 14

STATUTES

California Penal Code, § 190.3..... 18

REPLY BRIEF FOR PETITIONER

As demonstrated in the State's Brief on the Merits: (1) *Boyde* v. *California,* 494 U.S. 370 (1990), confirms that California's factor (k) instruction was constitutionally sufficient to allow the jury to consider Belmontes' mitigating character evidence of potential future adjustment to life in prison and, in any event, there is no reasonable likelihood that the jury did not consider such evidence in light of the facts of this case; and (2) the circuit court's holding that the factor (k) instruction did not allow consideration of such evidence violates the non-retroactivity doctrine of *Teague* v. *Lane,* 489 U.S. 288 (1989). Belmontes fails to refute any of these points.

I.

THERE IS NO REASONABLE LIKELIHOOD THAT BELMONTES' JURORS MISAPPLIED ANY OF THE INSTRUCTIONS TO PREVENT CONSIDERATION OF ANY CONSTITUTIONALLY RELEVANT EVIDENCE

Belmontes' opposition brief is conspicuous, not for what it asserts, but rather for what it *does not* challenge. Although Belmontes avers that the factor (k) instruction might be "least effective" with respect to evidence of future prison adjustment, he does not appear to have any significant quarrel with the instruction's constitutional sufficiency. Indeed, Belmontes apparently acknowledges that the factor (k) would generally provide sufficient guidance to allow jurors to consider "forward-looking" character evidence suggesting future adaptability to prison. Belmontes argues, however, that the fates somehow conspired *in his particular case* to mislead the jurors to disregard *his particular evidence* of future adaptability. Resp. Br. 19-20,

n. 3. As explained below, none of Belmontes' various fact-specific assertions, whether viewed individually or cumulatively, reveal any reasonable likelihood that the jurors in this case ignored any of his proffered evidence in mitigation.

A. Neither The Prosecutor Nor Defense Counsel Argued That Belmontes' Mitigation Evidence Could Not Be Considered Under The Factor (k) Instruction

Belmontes claims that the parties' closing statements confused the jurors about whether they could consider his evidence of future adaptability to prison. Resp. Br. 28-31. This argument is premised on isolated remarks that, when viewed in context, could not have been misinterpreted to preclude consideration of this evidence.

Belmontes' complaint about the prosecutor's closing argument rests entirely on the following comments about whether Belmontes' prior "religious experience" during his CYA commitment was cognizable under the "catch-all" factor (k) instruction: "I'm not sure it really fits in there [i.e. the factor (k)]. I'm not sure it really fits in any of them. But I think it appears to be a proper subject of consideration." J.A. at 154. From these remarks, Belmontes concludes that the prosecutor acknowledged that the evidence of future prison adaptability did not fall within any of the enumerated factors. Resp. Br. 28.

The prosecutor here said nothing to suggest that any potentially mitigating evidence was beyond the jury's reach. To the contrary, the fairest view of these remarks, when viewed in context, is that the prosecutor was merely arguing that Belmontes' evidence of a prior religious

conversion while incarcerated carried little if any *mitigating weight*. The prosecutor immediately followed these remarks with the observation that "it's no secret that the evidence upon which the defendant's religious experience rests is somewhat shaky." J.A. at 154. This comment was entirely fair in light of the fact that Belmontes' alleged religious awakening disappeared as soon as he was released from custody. Accordingly, the prosecutor properly warned the jury to view Belmontes' evidence of a "genuine and sincere religious experience" with "a grain of salt." J.A. at 154.

The prosecutor nonetheless acknowledged that the jurors *could* consider evidence of Belmontes' religious experience in determining his potential for future institutional adjustment: "I suppose you can say [Belmontes' religious awakening] would be appropriate because—in this fashion: The defendant may be of value to the community later." Indeed, the prosecutor told the jurors that they could, and *should*, consider Belmontes' future prospects: "And I think that value to the community [in the future] is something that you have to weigh in. There's something to that." J.A. at 155.

"[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974). In this case, no reasonable juror would have interpreted the prosecutor's comments to mean that factor (k) *legally prohibited* consideration of any of Belmontes' proffered evidence.

Belmontes also argues that defense counsel somehow confused the jury with the following comments:

> I'd like to comment about the evidence that we've presented and what [the prosecutor] told you he thought it means, and I'm not going to insult you by telling you I think it excuses in any way what happened here. That is not the reason I asked these people to come in.

J.A. at 166. Relying on these remarks, Belmontes faults his trial counsel for allegedly "conceding" that the factor (k) instruction did not permit consideration of his evidence. Specifically, he claims that this purported "concession reinforced the jury's confusion and uncertainty about whether the evidence of good future institutional adjustment was cognizable under the enumerated factors." Resp. Br. 30.

Trial counsel conceded nothing about any defense evidence allegedly being beyond the scope of the factor (k) instruction. Quite the contrary, trial counsel's remarks about not attempting to use the evidence to excuse the crime echoed the factor (k)'s plain language, which directed the jurors to consider "any other circumstance which extenuates the gravity of the crime *even though it is not a legal excuse for the crime*." J.A. at 184 (emphasis added).

Immediately after these comments, defense counsel went on to point out that the facts of the crime were insufficient by themselves to reveal the totality of Belmontes' potential value as a person. Then, in support of his plea for a sentence of life without parole, defense counsel effectively argued that, in light of the evidence of Belmontes' prior CYA commitment, he could "fit[ ] into the system"

and "contribute something" in the future while still suffering the "harsh penalty [of] life in prison without ever being released." J.A. at 166-170.

This argument related directly to the factor (k) instruction. Even thought there could be no *legal excuse* for the murder in this case, defense counsel's argument effectively urged the jurors to consider Belmontes' worth as a person, combined with his future potential as a life prisoner, as perhaps extenuating the gravity of his crime for purposes of their sentencing determination. That message would not have been lost on any reasonable juror. More importantly, no juror would have understood any portion of the defense argument as a concession that the factor (k) instruction precluded consideration of any relevant mitigating evidence.

In sum, neither the prosecutor nor defense counsel said anything to suggest that the jury could not consider any evidence in mitigation. In fact, both parties made it perfectly clear that the jurors could consider any such evidence.

B. The Court's Special Instruction Only Reinforced The Availability Of The Defense Mitigation Evidence For The Jurors' Consideration

In addition to the standard CALJIC 8.84.1 instruction, which culminated with the catch-all factor (k), the jurors were given the following "special instruction."

> I have previously read you a list of aggravating circumstances which the law permits you to consider if you find that any of them is established by the evidence. These are the only aggravating circumstances that you may consider. You are not

> allowed to take account of any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.
>
> However, the mitigating circumstances which I have read for your consideration are given to you merely as examples of some of the factors that you may take into account as reasons for deciding not to impose a death penalty or a death sentence upon Mr. Belmontes. You should pay careful attention to each of these factors. Any one of them standing alone may support a decision that death is not the appropriate punishment in this case.

J.A. at 185-186. Belmontes insists that the standard CALJIC 8.84.1 instruction and the "special instruction" were "internally inconsistent" so as to confuse the jurors about the proper guidelines of their sentencing responsibilities. This is so, according to Belmontes, because the standard CALJIC 8.84.1 instruction did not specify whether the various statutorily-designated factors were either "aggravating" or "mitigating." In the "special instruction," however, the jurors were in fact expected to distinguish between "aggravating" and "mitigating" circumstances. Thus, the reference to "aggravating" and "mitigating" circumstances in the "special instruction" allegedly confused the jurors about "whether there was a single list of relevant factors or separate lists of aggravating and mitigating factors." Resp. Br. 21-22.

It is true that many of the listed factors set forth in CALJIC 8.84.1 could serve as either aggravating or mitigating circumstances, depending on the facts the jurors found to be true. See *Tuilaepa* v. *California*, 512 U.S 967, 978-79 (1994). Belmontes' argument, however, presupposes

that his jurors were somehow unable to discern for themselves whether the evidence established any given factor as "aggravating" as opposed to "mitigating."

This argument strains credulity. The standard instructions themselves informed the jurors that it was *their duty to determine* whether the evidence established either "aggravating" or "mitigating" circumstances. The jurors were expressly told that, in deciding between a sentence of death or life imprisonment, they were to "weigh the mitigating circumstances against the aggravating circumstances that you find to be established by the evidence." J.A. at 185. Thus, even without reference to the "special instruction," the standard instructions already required the jurors to determine the existence of any applicable "aggravating" or "mitigating" circumstances, based on the evidence presented. Belmontes does not explain how his jury, or any other California jury given these same standard instructions, would be unable to make such a commonsense determination.

Accordingly, there is virtually no chance—let alone a reasonable likelihood—that the jurors were confused about their role in finding whether the evidence established any aggravating or mitigating circumstances for purposes of their penalty judgment. As set forth at length in the State's Brief on the Merits, the factor (k) instruction was alone sufficient to allow the jurors to consider, and give effect to, all of Belmontes' proffered evidence in mitigation. The "special instruction" only reinforced to the jurors that they could consider *any* relevant circumstance in mitigation. The "special instruction" expressly limited the jurors' consideration of *aggravating circumstances* to the factors that had been previously enumerated. Conversely, the "special instruction" expressly clarified that

mitigating circumstances were not limited to those that had been enumerated. J.A. at 185-186. The "special instruction," therefore, certainly did not create any confusion. To the contrary, this "special instruction" eliminated any chance that the jurors might have misunderstood the catch-all factor (k) to foreclose consideration of any relevant mitigating evidence.

C. There Is No Reasonable Likelihood That The Trial Court's Answers To Juror Questions Caused Any Confusion About The Permissible Scope Of Mitigating Evidence

Belmontes' opposition focuses on the jurors' various questions to the trial court during an informal mid-deliberation colloquy. Belmontes expends considerable energy speculating about how these questions might have reflected some sort of juror confusion and about how the court's responses to those questions might have reinforced this alleged confusion. Resp. Br. 22-28. These arguments are puzzling because the Ninth Circuit's opinion did not turn on, or even rely on, any of these assertions.

Although the Ninth Circuit panel majority found that the juror questions might have revealed some misunderstanding, the panel noted that it "did not need to rely on affirmative evidence of juror confusion [as allegedly revealed by juror questions] in order to reach [its] conclusion." Instead, the panel below found that the juror questions merely "strengthen[ed] [its] conclusion that the original and supplemental instructions did not convey to the jury that it could consider Belmontes' nonstatutory mitigating evidence pertaining to his probable future in prison if incarcerated for life." P.A. at 296a-297a, n. 19. Belmontes is now, in effect, asking this Court to disregard

the circuit court's overriding holding regarding the constitutionality of the factor (k) instruction. Belmontes instead seeks to shift the inquiry toward the trial court's mid-deliberation colloquy, which was not essential or even particularly germane to the lower court's analysis.[1]

Belmontes' complaints about the juror questions fare no better than his argument about the "special instruction." First, he argues that the trial court's answers to Juror Hern's questions conveyed the message that the jury's consideration of mitigating circumstances was limited to a "circumscribed and finite number of permissible factors. . . ." Resp. Br. 24. Second, he claims that the court's answer to Juror Hailstone's question "confirmed" that the jury's consideration of mitigating circumstances was confined to these "specifically listed factors." Resp. Br. 27.

None of the jurors' questions expressed any confusion about whether they could consider Belmontes' proffered evidence in mitigation. The mid-deliberation discussion with the court was prompted solely in response to the jurors' request for information about the consequences of their possible inability to reach a unanimous verdict. The judge informed them that he could not give them such information.[2] After advising the jurors to review the

---

[1] Belmontes' efforts in this regard are understandable because, as noted in the State's Brief on the Merits, his complaint about the trial court's mid-deliberation discussion with Juror Hern was Belmontes' sole claim of instructional error presented to the Ninth Circuit.

[2] As the California Supreme Court held, the trial court properly refrained from informing the jurors of the consequences of their possible inability to reach a verdict. P.A. at 221a-222a; see *People* v. *Kimble*, 44 Cal.3d 480, 511-515, 749 P.2d 803, 826, 244 Cal.Rptr. 148, 168, 171 (1988); see also *Jones* v. *United States*, 527 U.S. 373, 381-382

(Continued on following page)

previous instructions, the court ascertained from them that they might be able to reach a unanimous verdict after reviewing the instructions and deliberating further. J.A. at 188-190.

Only then did Juror Hern ask, "The statement about the aggrevation (sic) and mitagation (sic) of the circumstances, now, that was the listing?" Juror Hern also asked, "Of those certain factors we were to decide one or the other and then balance the sheet?" The trial court answered these questions, respectively, with the following responses: "That was the listing, yes, ma'am" and "That is right. It is a balancing process." J.A. at 191.

The juror's use of the term "listing" did not suggest an unconstitutionally restrictive view of the permissible scope of mitigating evidence.[3] Nor did her use of the metaphor "balance the sheet" reveal any confusion about her role or duties in deciding the proper penalty. Neither of these questions required, or even suggested, that the court should provide any additional clarification beyond the very clear instructions already given. To the contrary, these questions merely indicated that Juror Herm was *confirming* her understanding of the proper procedure under

---

(1999) (the federal constitution does not require a penalty-phase jury to be informed of the consequences of the inability to reach a unanimous verdict).

[3] Indeed, to accept Belmontes' claim that the juror's reference to "listing" might somehow reveal an improperly limited view of the available mitigating circumstances, one must first accept the Ninth Circuit's view that factor (k) would in fact be misunderstood to limit the scope of available mitigating circumstances. However, as discussed at length in the State's Brief on the Merits, no reasonable juror would have misinterpreted factor (k) to prohibit consideration of any of Belmontes' evidence.

California law of balancing mitigating and aggravating circumstances in arriving at a penalty judgment. The court's responses were proper because, as the jurors had already been instructed, their penalty judgment required them to determine whether "the mitigating circumstances outweigh the aggravating circumstances." J.A. at 185.

A moment later, Juror Hailstone asked, "I don't know if it is permissible. Is it possible that he could have psychiatric treatment during this time?" The trial court's response—"That is something you cannot consider in making your decision"—was proper because there had been no evidence concerning the need for, or the availability of, any such treatment. J.A. 191. Once again, Juror Hailstone's inquiry did not suggest any confusion requiring further clarification.

To the contrary, the question about possible future psychiatric treatment reveals that the jurors were *already considering* Belmontes' possible future as a life prisoner. The trial court's response would not have deterred reasonable jurors from considering any *evidence* concerning Belmontes' future prospects. Indeed, the initial portion of Juror Hailstone's inquiry—"I don't know if it is permissible"—reflects a tacit understanding that he was requesting information beyond the evidence presented. Such an acknowledgment is not surprising because the jurors had been expressly instructed that it was their duty "to determine the facts from the evidence received *and not from any other source.*" J.A. 175 (emphasis added.)

The jurors in this case were not shy or reluctant to ask questions if they wished clarification on points of law. If the jurors had been uncertain about whether they could consider *any evidence* for any potential mitigating purpose,

they almost certainly would have voiced such concerns to the trial judge, who was plainly receptive to their questions. Yet none of the juror questions suggested even remotely that they were confused about whether they could consider any evidence as possibly relating to future adaptability or to *any* potential circumstance in mitigation. Nothing in any of the trial court's proper responses to these questions would have misled any juror to believe he or she could not use Belmontes' proffered evidence for any constitutionally permissible purpose. For these reasons, this is not a case where constitutional error might be gleaned from subtle interpretations of informal juror questions.

Even if it were permissible for a federal habeas court to divine an Eighth Amendment violation from such vagaries, the actual instructions given here obviate virtually any chance that the jurors in this case were misled to ignore any of Belmontes' "forward-looking" evidence. As discussed in depth in the State's Brief on the Merits, *Boyde* confirms that the catch-all factor (k) instruction permitted the jury to consider all of the background and character evidence that served as the entire basis for Belmontes' argument about his future adaptability to life in prison. Moreover, this same standard instruction's direction to consider "[t]he age of the defendant at the time of the crime" (J.A. at 184), allowed the jury to take account of Belmontes' youth. This directive to consider Belmontes' youth provided *yet another* avenue for the jury to consider his possible future prospects. *Johnson* v. *Texas*, 509 U.S. 350, 368 (1993). Finally, the additional "special instruction," which informed the jury that potential mitigating

circumstances were not limited to those previously listed, foreclosed virtually any chance that the jurors would feel compelled to ignore any potential mitigating factor established by the evidence.

The trial judge advised the jurors to review these instructions during this mid-deliberation exchange. Belmontes, however, quibbles with the State's assertion that the trial court's advisement amounted to a "direction" for the jury to re-read the instructions. As Belmontes points out, the trial court's reference to re-reading the instructions came in the form of a question to the jury. Specifically, the court, in response to the jury's inquiry regarding the consequences of a deadlock, inquired, "Do you think if I allow you to continue to discuss the matter and for you to go over the instructions again with one another, that the possibility of making a decision is there?" Two jurors assented to this proposal and the court replied, "I think so. I think you need more time."

Although the court's "directive" came in the form of a question, it still retained the force of an instruction to the jury on how to proceed. The judge specifically inquired whether more time and a review of the instructions would help the jury in its deliberations. That specific inquiry notified the jury of the course of action it was to take in an effort to resolve a possible deadlock. Once the jury agreed that such actions might be helpful, there was no need for the court to affirmatively direct the jurors to do what they had just agreed to do. The jury's assent to the court's inquiry was obviously an acceptance of the court's direction of how the jury was to proceed. Accordingly, Belmontes' claim that the trial court did not "direct" the jury to review the instructions is not supported by the record.

There is also nothing in the record to indicate that the jury did not follow the court's advisement to review the instructions. See *Weeks* v. *Angelone*, 528 U.S. 225 (2000) (no likelihood of confusion where the trial judge referred jury back to original instructions when the jury asked a question regarding the instructions themselves). Indeed, the jury would have attributed "great weight" to the directive to review the instructions, which the trial court gave in response to their questions. *Bollenbach* v. *United States*, 326 U.S. 607, 612 (1946). Even if some juror confusion might have existed, a review of these instructions would have resolved it.

The jurors in this case were clearly aware of the solemn nature of their penalty determination and, therefore, would reasonably have given a broad interpretation of potential mitigating circumstances. *Johnson* v. *Texas*, 509 U.S. at 370. Every rational inference to be drawn from the record indicates that the jurors did in fact embrace an expansive view of potential mitigating circumstances.

D. The Jurors' Requests To Have Testimony Re-Read Reveal No Confusion About The Permissible Scope Of Mitigating Evidence

The morning after the trial court held the mid-deliberation discussion with the jury, the jurors asked to have Belmontes' testimony, the pathologist's testimony, and Bob Bolanos[4] testimony re-read to them. J.A. at 195. Belmontes now asserts perfunctorily that this request to re-hear testimony about the underlying murder somehow

---

[4] Bolanos was one of the accomplices to the residential burglary that resulted in Belmontes' murder of Steacy McConnell.

"confirm[s] that [the jurors] were diverted from the mitigation evidence of future institutional adjustment and refocused on the circumstances of the crime, narrowly defined." Resp. Br. 31.

Belmontes' argument reduces serious constitutional analysis to the level of reading tea leaves. It is hardly surprising that this jury wanted to review the evidence of the murder before arriving at a final penalty verdict. The jurors were instructed that, in considering the proper penalty to be imposed, they were to consider "all of the evidence which has been received during any part of the trial in this case. . . ." J.A. at 183. The first "factor" set forth in the standard CALJIC 8.84.1 instruction directed them to consider "[t]he circumstances of the crime of which the defendant was convicted. . . ." J.A. at 184. The prosecution conceded repeatedly that the evidence presented concerning Belmontes' background was "a wash" with respect to aggravation and mitigation, with the decisive sentencing factor being the circumstances of the crime itself. J.A. at 158-160.

The jurors' request to review evidence of the crime itself does not disclose a repudiation of the clear instructions in this case or a decision to ignore any of Belmontes' evidence of future adaptability to prison. This claim, like all of Belmontes' arguments, constitutes precisely the type of speculative legal hairsplitting condemned in *Boyde*. *Boyde*, at 380-81.

Several witnesses testified, without objection, in support of Belmontes' argument of future institutional adjustment. As in *Boyde*, the factor (k) instruction permitted consideration of all this evidence, and the additional special instruction confirmed that the jury

could consider *any* mitigating factor established by the evidence. Neither the court nor any of the parties or witnesses said anything to suggest that the jury could not consider Belmontes' possible future prison adjustment. For the jurors to have nonetheless felt compelled to reject all such evidence, in contravention of everything that had been said and presented, they would have to have believed that the penalty phase trial was a pointless exercise or, as stated in *Boyde*, "a virtual charade." *Boyde*, at 383-84; see also *Brown* v. *Payton*, 544 U.S. 133, 144 (2005) ("like in *Boyde*, for the jury to have believed it could not consider Payton's mitigating evidence, it would have had to believe that the penalty phase served virtually no purpose at all").

II.

THE NINTH CIRCUIT'S DECISION IN THIS CASE VIOLATES THE NON-RETROACTIVITY DOCTRINE OF *TEAGUE* v. *LANE*, 489 U.S. 288 (1989)

Belmontes' response to the State's *Teague* claim is notable for what it *does not* say. In particular, Belmontes nowhere addresses the necessary import of this Court's subsequent decisions in *Boyde* and *Payton* in assessing whether the Ninth Circuit's holding in this case was dictated by controlling precedent existing at the time his judgment became final.

Instead, Belmontes relies on *Hitchcock* v. *Dugger*, 481 U.S. 393 (1987), and *Penry* v. *Lynaugh*, 492 U.S. 302

(1989).[5] Neither of these decisions dictated the Ninth Circuit's holding in this case.

In *Hitchcock*, this Court affirmed the previous holdings in *Lockett* v. *Ohio*, 438 U.S. 586 (1978), *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982), and *Skipper* v. *South Carolina*, 476 U.S. 1, 7 (1986), in concluding that a capital sentencer may not be "instructed not to consider," and may not "refuse[ ] to consider, evidence of nonstatutory mitigating circumstances" such as the "testimony concerning petitioner's family background and his capacity for rehabilitation." *Hitchcock*, at 398-99. In *Penry*, the Court found that the Texas statute was facially insufficient to satisfy the Eighth Amendment *in that particular case* because, without some additional instruction, Texas' three "special questions" precluded the jurors from considering or giving *any mitigating* effect to Penry's evidence of his mental retardation and abused childhood. *Penry*, at 320-28.

These cases merely confirm the principle, set forth in *Lockett* and its progeny, that a state "may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the

---

[5] Notably, *Penry* was not decided until after Belmontes' judgment had become final and, therefore, could not have dictated the circuit court's holding. Indeed, the timing of the *Penry* decision and this Court's disposition of Belmontes' certiorari petition from his direct state appeal suggests that *Penry's* reasoning does not apply in this case. Among the questions presented in that petition, Belmontes claimed generally that the trial court's instructions and answers to juror questions prevented the jury from considering his mitigating evidence. Resp. Br. 46. This Court denied Belmontes' certiorari petition during the same period it was considering its decision in *Penry*. *Belmontes* v. *California*, 488 U.S. 1034 (certiorari denied January 17, 1989); *Penry* v. *Lynaugh*, 492 U.S. 302 (matter argued January 11, 1989, decided June 26, 1989).

inquiries to which it is relevant so severely that *the evidence could never be part of the sentencing decision at all.*" *Johnson* v. *Texas*, 509 U.S. at 361 (emphasis added, quoting *McKoy* v. *North Carolina*, 494 U.S. 433, 456 (1990), Kennedy, J., concurring).

At the time Belmontes' judgment was pending, it was established that California's capital statute permitted consideration of all mitigating evidence. *People* v. *Boyd*, 38 Cal.3d 762, 775, 700 P.2d 782, 791-92, 215 Cal.Rptr. 1, 10-11 (1985). The instruction at issue recited the California statute verbatim (J.A. 183-184; Cal. Pen. Code, § 190.3), and no authority extant at that time dictated the conclusion that jurors would misinterpret the catch-all factor (k) to foreclose consideration of any relevant mitigating evidence.

Indeed, this Court's subsequent decision in *Boyde* confirms that the factor (k) instruction, even "standing alone," would be reasonably understood to permit consideration of mitigating evidence unrelated to the crime, such as a defendant's background and character. *Boyde*, at 380-382. In light of *Boyde*, it certainly cannot be said that any prior precedent dictated the circuit court's holding that factor (k) would likely prevent jurors from considering character evidence tending to show prospects for institutional adjustment.

Moreover, the subsequent decision in *Payton* reveals that the Ninth Circuit's purported distinction between "general" character evidence and "forward-looking" character evidence relating to future adaptability was not dictated by prior precedent. Because it was *at least reasonable* for the state court to conclude that *Boyde* applied to Payton's "forward-looking" post-crime evidence (*Payton*,

at 141-143), it was also reasonable to conclude, even before *Boyde*, that factor (k) permitted consideration of Belmontes' "forward-looking" evidence of prior institutional adjustment. It certainly would not have been "apparent to all reasonable jurists" at that time that the instruction at issue violated the Eighth Amendment. *Lambrix* v. *Singletary*, 520 U.S. 518, 528 (1997).

In sum, the Ninth Circuit's decision to grant habeas relief in this case was not dictated by earlier precedent and, therefore, is barred under *Teague*.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

Dated: September 11, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of the
State of California
MARY JO GRAVES
Chief Assistant Attorney General
MICHAEL P. FARRELL
Senior Assistant Attorney General
DONALD E. DENICOLA
Deputy State Solicitor General
ERIC L. CHRISTOFFERSEN
Assistant Supervising Deputy
Attorney General

MARK A. JOHNSON
Assistant Supervising Deputy
Attorney General
Counsel of Record

Counsel for Petitioner

Supreme Court, U.S.
FILED
JUN 19 2006
OFFICE OF THE CLERK

No. 05-493

IN THE

Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

vs.

FERNANDO BELMONTES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
Counsel of Record
CRYSTAL L. WAITKUS
Criminal Justice Legal Fdn.
2131 L Street
Sacramento, CA 95816
Phone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

QUESTIONS PRESENTED

1. Does the instruction approved in *Boyde* v. *California* place within the reach of the sentencing jury mitigating evidence of past good behavior in prison?

2. Would a negative answer to Question 1 be a new rule subject to the limitation of *Teague* v. *Lane*?

3. Should the second exception to *Teague* be declared *per se* inapplicable to new rules which go only to the discretionary choice of sentence within an authorized range and have no bearing whatever on guilt or eligibility for the punishment?

TABLE OF CONTENTS

Questions presented i

Table of authorities iv

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 5

Argument 7

I

Lockett v. *Ohio* is a failed and groundless decision; it should be narrowly interpreted and not expanded 7

A. A failed decision 7

B. A groundless decision 12

C. Tinkering 15

II

The Court of Appeals seriously misinterpreted *Boyde* v. *California* 16

III

So long as all mitigating evidence can be given effect, existing law does not require that it be considered in every possible way 18

IV

Rules affecting only the discretionary sentencing decision should be categorically excluded from the second *Teague* exception 21

Conclusion 26

TABLE OF AUTHORITIES

Cases

Apprendi v. New Jersey, 530 U. S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000) 12

Atkins v. Virginia, 536 U. S. 304, 153 L. Ed. 2d 335, 122 S. Ct. 2242 (2002) 25

Barefoot v. Estelle, 463 U. S. 880, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983) 20

Beard v. Banks, 542 U. S. 406, 124 S. Ct. 2504, 159 L. Ed. 2d 494 (2004) 11, 22, 23

Belmontes v. Brown, 414 F. 3d 1094 (CA9 2005) 4, 5, 16, 17, 18, 20

Belmontes v. California, 488 U. S. 1034, 109 S. Ct. 848, 102 L. Ed. 2d 980 (1989) 4

Belmontes v. California, 492 U. S. 938, 110 S. Ct. 28, 106 L. Ed. 2d 639 (1989) 4

Belmontes v. Stokes, 427 F. 3d 663 (CA9 2005) 5, 16

Belmontes v. Woodford, 350 F. 3d 861 (CA9 2003) 5

Belmontes v. Woodford, 359 F. 3d 1079 (CA9 2004) 5

Benton v. Maryland, 395 U. S. 784, 23 L. Ed. 2d 707, 89 S. Ct. 2056 (1969) 21

Bockting v. Bayer, 399 F. 3d 1010 (CA9 2005) 22

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) 3, 16, 17, 18, 20

Brown v. Belmontes, 544 U. S. 945, 125 S. Ct. 1697, 161 L. Ed. 2d 518 (2005) 5, 16

Brown v. Payton, 544 U. S. 133, 125 S. Ct. 1432,
161 L. Ed. 2d 334 (2005) 3, 16, 18

California v. Brown, 479 U. S. 538, 107 S. Ct. 837,
93 L. Ed. 2d 934 (1987) 3

Callins v. Collins, 510 U. S. 1141, 114 S. Ct. 1127,
127 L. Ed. 2d 435 (1994) 14, 15

Coker v. Georgia, 433 U. S. 584, 53 L. Ed. 2d 982,
97 S. Ct. 2861 (1977) 25

Coleman v. Thompson, 501 U. S. 722, 115 L. Ed. 2d 640,
111 S. Ct. 2546 (1991) 25

Dred Scott v. Sandford, 60 U. S. (19 How.) 393,
15 L. Ed. 691 (1857) 7

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1,
102 S. Ct. 869 (1982) 14

Enmund v. Florida, 458 U. S. 782, 73 L. Ed. 2d 1140,
102 S. Ct. 3368 (1982) 8, 25

Furman v. Georgia, 408 U. S. 238, 33 L. Ed. 2d 346,
92 S. Ct. 2726 (1972) 14

Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799,
83 S. Ct. 792 (1963) 21

Graham v. Collins, 506 U. S. 461, 113 S. Ct. 892,
122 L. Ed. 2d 260 (1993) 15, 20, 21

Gray v. Netherland, 518 U. S. 152, 116 S. Ct. 2074,
135 L. Ed. 2d 457 (1996) 26

Gregg v. Georgia, 428 U. S. 153, 49 L. Ed. 2d 859,
96 S. Ct. 2909 (1976) 7, 14, 25

Hitchcock v. Dugger, 481 U. S. 393, 95 L. Ed. 2d 347,
107 S. Ct. 1821 (1987) 10

Johnson v. Texas, 509 U. S. 350, 125 L. Ed. 2d 290,
113 S. Ct. 2658 (1993) 18, 19

Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929,
96 S. Ct. 2950 (1976) 7, 10, 19

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 7, 8, 9, 10, 12, 13, 20

Mackey v. United States, 401 U. S. 667, 28 L. Ed. 2d 404,
91 S. Ct. 1160 (1971) 21

McGautha v. California, 402 U. S. 183, 28 L. Ed. 2d 711,
91 S. Ct. 1454 (1971) 13, 14, 15

Middleton v. McNeil, 541 U. S. 433, 158 L. Ed. 2d 701,
124 S. Ct. 1830 (2004) 18

Mills v. Maryland, 486 U. S. 367, 100 L. Ed. 2d 384,
108 S. Ct. 1860 (1988) 11, 23

Murray v. Carrier, 477 U. S. 478, 91 L. Ed. 2d 397,
106 S. Ct. 2639 (1986) 24

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256,
109 S. Ct. 2934 (1989) 10, 11, 19

People v. Belmontes, 45 Cal. 3d 744, 248 Cal. Rptr. 126,
755 P. 2d 310 (1988) 2, 3, 4

People v. Boyde, 4[illegible]Cal. 3d 212, 758 P. 2d 25,
250 Cal. Rptr. 83, 758 P. 2d 25 (1988) 4

People v. Brown, 45 Cal. 3d 1247, 248 Cal. Rptr. 817,
756 P. 2d 204 (1988) 4

People v. Payton, 3 Cal. 4th 1050, 13 Cal. Rptr. 2d 526,
839 P. 2d 1035 (1992) 4

Proffitt v. Florida, 428 U. S. 242, 49 L. Ed. 2d 913,
96 S. Ct. 2960 (1976) 7, 8, 9

Roper v. Simmons, 543 U. S. 551, 125 S. Ct. 1183,
161 L. Ed. 2d 1 (2005) 25

Rose v. Lundy, 455 U. S. 509, 71 L. Ed. 2d 379,
102 S. Ct. 1198 (1982) 22

Saffle v. Parks, 494 U. S. 484, 108 L. Ed. 2d 415,
110 S. Ct. 1257 (1990) 22

Sawyer v. Smith, 497 U. S. 227, 110 S. Ct. 2822,
111 L. Ed. 2d 193 (1990) 26

Sawyer v. Whitley, 505 U. S. 333, 120 L. Ed. 2d 269,
112 S. Ct. 2514 (1992) 24

Schlup v. Delo, 513 U. S. 298, 130 L. Ed. 2d 808,
115 S. Ct. 851 (1995) 24

Schriro v. Summerlin, 542 U. S. 348, 124 S. Ct. 2519,
159 L. Ed. 2d 442 (2004) 23

Silverman v. United States, 365 U. S. 505, 81 S. Ct. 679,
5 L. Ed. 2d 734 (1961) 15

Stogner v. California, 539 U. S. 607, 123 S. Ct. 2446,
156 L. Ed. 2d 544 (2003) 13

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) 21, 22, 23, 24

Tichnell v. State, 287 Md. 695, 415 A. 2d 830 (1980) ... 11

Tuilaepa v. California, 512 U. S. 967, 129 L. Ed. 2d 750,
114 S. Ct. 2630 (1994) 25

Tyler v. Cain, 533 U. S. 656, 150 L. Ed. 2d 632,
121 S. Ct. 2478 (2001) 23

United States v. Booker, 543 U. S. 220, 125 S. Ct. 738,
160 L. Ed. 2d 621 (2005) 12

United States v. Morrison, 529 U. S. 598, 120 S. Ct. 1740, 146 L. Ed. 2d 658 (2000) 13

Walton v. Arizona, 497 U. S. 639, 111 L. Ed. 2d 511, 110 S. Ct. 3047 (1990) 14

Withrow v. Williams, 507 U. S. 680, 123 L. Ed. 2d 407, 113 S. Ct. 1745 (1993) 24

Woodson v. North Carolina, 428 U. S. 280, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 7

United States Constitution

U. S. Const., Art. III, § 3 12

United States Statutes

28 U. S. C. § 2244(b)(2)(A) 22

28 U. S. C. § 2244(b)(2)(B)(ii) 24

Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 ..... 12, 13

State Statute

Cal. Penal Code § 190.3(k) 3

Miscellaneous

1 California Jury Instructions, Criminal (4th ed. 1979) 11

Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996) 16

California Dept. of Justice, Current Update of Death Penalty Judgments (May 23, 2006) 4, 5

J. Liebman, J. Fagan, & V. West, Broken System: Error Rates in Capital Cases 1973-1995 (2000) 11

Sixty-Third Report of the Standing Committee on Rules of Practice and Procedure, 5 Md. Reg. 1490 (1978) 11

IN THE

Supreme Court of the United States

ROBERT AYERS, Acting Warden,

Petitioner,

vs.

FERNANDO BELMONTES,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The Court of Appeals for the Ninth Circuit has once again exceeded the scope of its limited role on habeas corpus to strike down a death sentence by inventing a new restriction not contained in this Court's precedents. This overturning of a

---

1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

validly imposed and affirmed sentence for a brutal and senseless murder is contrary to the interests CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

Twenty-five years ago, Steacy McConnell was 19 years old and living in Victor, a small community in California's Central Valley. Defendant Fernando Belmontes and two other men, Bobby Bolanos and Domingo Vasquez, decided to burglarize Steacy's residence and steal her stereo and other items. As the group left Vasquez's residence, Belmontes armed himself with a steel dumbbell bar. See *People* v. *Belmontes*, 45 Cal. 3d 744, 760-761, 755 P. 2d 310, 315-316 (1988) ("*Belmontes I*"). Steacy's parents found her later that day, badly beaten but still alive. She died shortly afterward. See *id.*, at 760, 755 P. 2d, at 315.

Bolanos testified that defendant admitted killing Steacy; "he had to 'take out a witness' because she was home." *Id.*, at 762, 755 P. 2d, at 316. Belmontes admitted participating in the burglary and striking the initial blow knocking Steacy unconscious, but he tried to blame the actual killing on Vasquez. His story was inconsistent with the blood on his shoes and with the victim's defensive wounds. See *id.*, at 762-765, 755 P. 2d, at 316-318. The jury rejected this story and expressly found that Belmontes had personally killed Steacy and specifically intended to kill her, in addition to finding the burglary-murder special circumstance. See *id.*, at 760, 791, 794, 755 P. 2d, at 315, 336, 338.

In addition to the horrific circumstances of the crime, the case in aggravation included a prior conviction for accessory to voluntary manslaughter and Belmontes' aggravated assault on his pregnant girlfriend. The latter incident included Belmontes' acts of cutting the phone cord when she tried to call the police and dragging her back into the apartment when she tried to escape. See *id.*, at 796-797, 755 P. 2d, at 339.

The case in mitigation included bad childhood evidence and Belmontes' religious conversion and work while confined in the California Youth Authority two years before the murder. See *id.*, at 797-798, 755 P. 2d, at 339-340.

The penalty phase instructions and argument, taken as a whole, were more favorable to the defense than those in any of this Court's prior California penalty phase instruction cases. Unlike *California* v. *Brown*, 479 U. S. 538, 539 (1987), the jury was instructed not to be swayed by " 'mere sentiment, conjecture, [] . . . , prejudice, public opinion, or public feeling,' " with the word "sympathy" deleted. See *Belmontes I*, 45 Cal. 3d, at 800-801, 755 P. 2d, at 342. The jury was instructed on the statutory circumstances, including the catch-all mitigating circumstance of California Penal Code § 190.3(k), "[a]ny other evidence which extenuates the gravity of the crime." However, unlike *Boyde* v. *California*, 494 U. S. 370, 373-374 (1990), this instruction was supplemented with an instruction that " 'the mitigating circumstances which I have read for your consideration are given to you *merely as examples* of some of the factors that you may take into account as reasons for deciding not to impose a death sentence upon Mr. Belmontes.' " *Belmontes I, supra*, at 801, 755 P. 2d, at 342 (emphasis added by the court).[2] Unlike *Brown* v. *Payton*, 544 U. S. 133, 144 (2005), the prosecutor's argument expressly confirmed that the evidence at issue before this Court *could* be considered as mitigating, although he properly argued it was not strong. See *Belmontes I, supra*, at 801-802, 755 P. 2d, at 342-343. The jury returned a verdict of death. See *id.*, at 760, 755 P. 2d, at 315.

The California Supreme Court unanimously affirmed. "Viewing the instructions and arguments as a whole, we conclude there is 'no legitimate basis' for believing the jury was misled regarding its sentencing responsibilities." *Id.*, at

---

2. In contrast to *Boyde*, one might say that this case involves an "adorned" factor (k) instruction. Cf. *Boyde*, 494 U. S., at 377.

802, 755 P. 2d, at 343 This unanimity further indicates that the instructions and arguments in this case were more clearly proper than those in the similar California cases this Court has reviewed to date. Cf. *People* v. *Brown*, 45 Cal. 3d 1247, 756 P. 2d 204 (1988) (on remand) (5-2); *People* v. *Payton*, 3 Cal. 4th 1050, 839 P. 2d 1035 (1992) (5-2); *People* v. *Boyde*, 46 Cal. 3d 212, 758 P. 2d 25 (1988) (4-3).

The state court also rejected Belmontes' claim that the penalty was disproportionate:

> "Defendant was convicted on extremely strong evidence that he committed an intentional murder of extraordinary brutality. He bludgeoned McConnell to death with an iron dumbbell bar; the force of the 15 to 20 some-odd blows leaving her with gaping wounds and a cracked skull. Her defensive wounds plainly evidenced a desperate struggle for life at defendant's hands. The murder occurred in the course of a calculated plan to burglarize the victim's home, to which defendant had gained entry on false pretenses. After the murder, defendant and his accomplices callously fenced the victim's stereo components for $100—purchasing beer with a portion of the proceeds." *Belmontes I*, 45 Cal. 3d, at 819, 755 P. 2d, at 354.

This Court denied certiorari on January 17, 1989. See *Belmontes* v. *California*, 488 U. S. 1034. Defendant petitioned for rehearing, which the Court denied on August 30, 1989. See *Belmontes* v. *California*, 492 U. S. 938.

On March 30, 1989, Belmontes filed a petition for writ of habeas corpus in the San Joaquin County Superior Court, the trial court. The petition was denied on April 7, 1989. See California Dept. of Justice, Current Update of Death Penalty Judgments (May 23, 2006) (periodic report filed with U. S. District Court, Northern Dist. of Cal.) ("Death Penalty Judgments"). On May 25, 1989, Belmontes filed a federal habeas petition, which the District Court held in abeyance for further exhaustion of state remedies. See *ibid.*; *Belmontes* v. *Brown*,

414 F. 3d 1094, 1111 (CA9 2005) ("*Belmontes V*"). Belmontes filed a habeas petition with the California Supreme Court on September 18, 1989, which the court denied on November 18, 1992. See Death Penalty Judgments. State remedies were thus exhausted in this case 14 years ago.

The District Court then took eight and a half years to decide the case, denying relief on May 15, 2001. Belmontes appealed, and a divided panel of the Court of Appeals granted relief. See *Belmontes* v. *Woodford*, 350 F. 3d 861 (CA9 2003) ("*Belmontes II*"). The full court denied rehearing en banc over the dissent of eight judges. See *Belmontes* v. *Woodford*, 359 F. 3d 1079 (CA9 2004) ("*Belmontes III*"). The warden petitioned for certiorari, and this Court vacated the decision and remanded for consideration in light of *Brown* v. *Payton, supra*. *Brown* v. *Belmontes*, 544 U. S. 945 (2005) ("*Belmontes IV*"). On remand, the Court of Appeals was again divided, and the majority "conclude[d] that *Payton* does not affect our holding in the present case." *Belmontes V*, 414 F. 3d, at 1101.

The full Ninth Circuit denied rehearing en banc, again over a vigorous dissent by seven judges. See *Belmontes* v. *Stokes*, 427 F. 3d 663 (2005) (*Belmontes VI*). This Court granted certiorari on May 1, 2006.

SUMMARY OF ARGUMENT

The Court of Appeals' decision in this case is an attempt to further expand the already bloated rule of *Lockett* v. *Ohio*. *Lockett* is a failed and groundless decision. It failed catastrophically in its central purpose to provide clear guidance and end the uncertainty regarding federal constitutional limitations on state capital sentencing procedure. It was groundless because the limitation it invented had no basis in the text or history of the Constitution or in the collective judgments of state legislatures. *Lockett* need not be overruled, but it should be frozen at its present boundaries, narrowly construed.

The Court of Appeals majority in the present case seriously misinterpreted *Boyde* v. *California*. It limited *Boyde*'s approval of the then-standard California catch-all instruction to evidence having a psychologically causal connection with the commission of the crime. *Boyde* contains no such limitation. It held that the instruction was sufficient to place all character and background evidence within the sentencer's reach.

Under *Johnson* v. *Texas*, capital sentencers are not required to consider mitigating evidence in every possible way. *Johnson* held that if mitigating evidence was within the sentencer's reach in answering a question on future dangerousness, it need not be considered for other mitigating implications the evidence might have. The present case is the mirror image of *Johnson*. Evidence of good behavior in a prior incarceration could be considered extenuating in itself under the instruction, and there is no constitutional requirement that it also be considered for its implications on future dangerousness in prison.

The Court of Appeals erroneously created a new rule on habeas corpus. *Graham* v. *Collins* establishes that rules of this type would not qualify for the second exception to the nonretroactivity rule of *Teague* v. *Lane*. More fundamentally, rules which govern the procedure for a discretionary sentencing choice within the legal range for the offense of conviction should be held categorically to *never* qualify for that exception. By definition, they do not go to questions of actual innocence or even to "innocence of the penalty" within the meaning of *Sawyer* v. *Whitley*. A great amount of pointless litigation and delay could be avoided by declaring a bright-line rule on this issue.

ARGUMENT

I. *Lockett* v. *Ohio* is a failed and groundless decision; it should be narrowly interpreted and not expanded.

The essence of the Court of Appeals' decision in this case is yet another attempt to expand the boundaries of the rule of *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). It is useful at the threshold to examine the *Lockett* decision, its intended effect, and its actual effect.

A. A Failed Decision.

The *Lockett* plurality recognized what was needed in capital sentencing law at that point. "The signals from this Court have not . . . always been easy to decipher. The States now deserve the clearest guidance that the Court can provide; we have an obligation to reconcile previously differing views in order to provide that guidance." *Id.*, at 602. Not since *Dred Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857) has any decision of this Court failed so completely in its central purpose. Instead of reconciling conflict, *Lockett* created new inconsistencies in previously settled law. As a result, instead of heralding an era of clarity and stability, *Lockett* opened the door to decades of confusion and chaos.

The case actually before the Court in *Lockett* was not difficult. The Ohio statute was essentially a mandatory death sentence law. Once an aggravating circumstance was found, death was the required sentence unless one of three unusual mitigating facts was also found: participation of the victim, duress, or mental illness. See *Lockett*, 438 U. S., at 607. This was not a "guided discretion" statute of the type upheld in *Gregg* v. *Georgia*, 428 U. S. 153 (1976), *Proffitt* v. *Florida*, 428 U. S. 242 (1976), or *Jurek* v. *Texas*, 428 U. S. 262 (1976). It was a mandatory statute tempered only by exclusion of a handful of cases. As such, only a very minor extension of *Woodson* v. *North Carolina*, 428 U. S. 280 (1976) would have been necessary to strike it down. Alternatively, Lockett's

sentence might have been set aside on the ground that she was a minor accomplice in a felony-murder case with no intent to kill, see 438 U. S., at 589-591 (plurality opinion); *id.*, at 628 (White, J., concurring in part and dissenting in part), a rule subsequently adopted in *Enmund* v. *Florida*, 458 U. S. 782, 801 (1982). Instead of these limited and sensible approaches, the *Lockett* plurality handed down an edict of breathtaking sweep. "[T]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, *any* aspect of the defendant's character or record and any of the circumstances of the offense that the *defendant* proffers as a basis for a sentence less than death." *Lockett*, *supra*, at 604 (emphasis added and deleted, footnote omitted).

Given an extreme interpretation (as it subsequently was), this pronouncement was contrary to both *Proffitt* and *Jurek*. *Lockett* created confusion because it failed to specify just how far it was going in disapproving sentencing systems that the Court had previously approved.

Proffitt rejected the main attack on Florida's system, that it was unconstitutional "because it *allows* discretion to be exercised at each stage of a criminal proceeding . . . ." 428 U. S., at 254 (lead opinion) (emphasis added). *Proffitt* then went on to review the essential features of the Florida system and approve the system so described. The Florida statute specified the mitigating factors. *Id.*, at 249, n. 6. There was no catch-all factor.

> "On their face these procedures . . . appear to meet the constitutional deficiencies identified in *Furman*. The sentencing authority in Florida, the trial judge, is directed to weigh eight aggravating factors against *seven* mitigating factors to determine whether the death penalty shall be imposed." *Id.*, at 251 (emphasis added).

If that were not clear enough, the *Proffitt* Court modified its quotation of the Florida statute to insert "statutory" before

"mitigating." *Id.*, at 250. Thus, the *Proffitt* Court understood the Florida system to weigh on the mitigating side a specified list of enumerated factors. If the lack of a "catch-all" factor was a constitutional defect, it was apparent on the face of the statute. Yet *Proffitt* did not see it as a defect. The *Lockett* plurality notes that the *Proffitt* lead opinion made a tangential reference to the absence of explicitly limiting language in the state statute on mitigating factors. See *Lockett*, 438 U. S., at 606, and n. 15. However, that reference was made in connection with discussion of another point, whether a death sentence could rest entirely on nonstatutory aggravating factors. See *Proffitt*, 428 U. S., at 250, n. 8; *Lockett*, *supra*, at 629-630 (Rehnquist, J., dissenting in part). It certainly cannot support the proposition that *Proffitt* based its approval of the Florida system on any assumption that the sentencer was directed to consider nonstatutory mitigating factors.

Jurek's approval of the Texas system is even more strongly contrary to any such requirement. The Texas system called for the jury to answer specific questions, one of which was on future dangerousness. See *Lockett*, 438 U. S., at 607. Although the Texas Court of Criminal Appeals had said it would "permit the sentencer to consider 'whatever mitigating circumstances' the defendant might be able to show," *ibid.* (quoting *Jurek*, 428 U. S., at 272-273), the state court certainly had not said the jury would be instructed to base its answer on anything other than the statutory questions, nor could the statute be reasonably construed to allow it to do so.

The *Lockett* plurality attempted to reconcile its edict with *Proffitt* and *Jurek*, saying, "None of the statutes we sustained in *Gregg* and the companion cases *clearly* operated at that time to *prevent* the sentencer from considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." *Ibid.* (emphasis added). There is a world of difference between not clearly preventing something and clearly requiring the same thing. It was crystal clear that neither the Florida statute nor the Texas

statute previously approved by the Court affirmatively required the sentencer to consider any mitigating factors other than those listed in the statute, and *Lockett* did not expressly resolve whether such affirmative action was required.

The looming conflict between the *Lockett* plurality's rule and the precedents was not lost on the dissenters. Justice White called it an "about-face." *Id.*, at 622. Justice Rehnquist said it was "indisputably clear" that the opinion was "scarcely faithful to what has been written before." *Id.*, at 630-631. Even so, it would be many years before the full extent of the damage was known. Some states that had written their statutes and standard instructions in reliance on this Court's approval in *Proffitt* and *Jurek* continued to rely on those precedents in the absence of an honest overruling, misled by *Lockett*'s pretense of consistency.

Less than a month after *Proffitt*, James Hitchcock strangled and murdered 13-year-old Cynthia Driggers. Hitchcock had molested her, and he killed her when she said she would tell. See *Hitchcock* v. *Dugger*, 481 U. S. 393, 394 (1987). He was tried for that crime under the eminently reasonable belief that Florida law limited mitigating circumstances to the statutory list and that *Proffitt* had upheld that system. Hitchcock's sentence was overturned because his trial judge had committed the "error" of taking *Proffitt* at its word. This was contrary to *Lockett*, this Court held, see *id.*, at 399, in an opinion that curiously omits any mention of *Proffitt*.

The situation in Texas was even worse. Although Florida changed its statute and instructions on mitigating circumstances after *Lockett*, see *id.*, at 396-397, Texas continued to rely on *Jurek*. That case clearly held that the Texas system passed constitutional muster by allowing the defendant to "bring to the jury's attention whatever mitigating circumstances he may be able to show," 428 U. S., at 272, even though the jury *instructions* only asked about future dangerousness. See *id.*, at 272-274. In 1989, *Penry* v. *Lynaugh*, 492 U. S. 302, 328 decided that the instructions *Jurek* had found sufficient were not

sufficient under *Lockett*. The dissent noted that the majority's holding "flatly contradicts [*Jurek*'s] analysis." *Id.*, at 355 (opinion of Scalia, J.).

The rapacious growth of the *Lockett* rule has repeatedly frustrated the best efforts of state legislatures and judiciaries to craft capital sentencing instructions. Maryland enacted a post-*Gregg* statute in 1978. See *Tichnell* v. *State*, 287 Md. 695, 720, 415 A. 2d 830, 843 (1980). A committee of the state bar then crafted an instruction to meet the requirements of the statute and of this Court's precedents, including *Lockett*, as they were then understood. Sixty-Third Report of the Standing Committee on Rules of Practice and Procedure, 5 Md. Reg. 1490-1493 (1978). The state's highest court reviewed and approved the instruction and wrote it into the rules of court. See *Tichnell*, *supra*, at 727; 415 A. 2d, at 847; *Mills* v. *Maryland*, 486 U. S. 367, 384-389 (1988). It was used for a decade in every capital case until a narrow majority of this Court decided it was contrary to *Lockett*. See *Mills*, *supra*, at 384. The *Mills* rule was not dictated by *Lockett*, however. It was an expansion of *Lockett*. See *Beard* v. *Banks*, 542 U. S. 406, 416 (2004).

Similarly, the instruction at issue in the present case was also a standard state jury instruction, believed by experts in the field to conform to all applicable requirements at the time it was drafted. See 1 California Jury Instructions, Criminal, No. 8.84.1, pp. 335-336 (4th ed. 1979) ("CALJIC 4th"). The Court of Appeals is mistaken when it says CALJIC is a product of the legislature. See *Belmontes V*, 414 F. 3d, at 1134, n. 18. These instructions were the product of a committee of judges, prosecutors, and defense lawyers. See CALJIC 4th, at v.

A controversial study by opponents of the death penalty claimed that 68% of death penalty cases from 1973 to 1995 were infected with "serious error," defined as any defect that resulted in the sentence being reversed. See J. Liebman, J. Fagan, & V. West, Broken System: Error Rates in Capital Cases 1973-1995, text accompanying notes 40 and 130 (2000).

Yet it is painfully evident from cases such as *Hitchcock*, *Penry*, and *Mills* that a great many of these supposedly serious errors were not errors at all under the law in effect at the time of the trial. They were standard instructions genuinely and reasonably believed to conform to this Court's precedents, and they only became "error" long after trial as the *Lockett* cancer continued to metastasize. The serious error here is that well-deserved sentences of brutal murderers are repeatedly overturned despite their compliance with then-existing precedent.

The bitter irony is that all this chaos, confusion, and injustice has flowed from a decision that acknowledged "an obligation to reconcile previously differing views in order to provide [the clearest] guidance." *Lockett*, 438 U. S., at 602. The present case illustrates that this obligation is unpaid and long past due. *Lockett* has been a total failure.

B. A Groundless Decision.

Turmoil, confusion, and the unsettling of settled expectations are sometimes a price that must be paid when a constitutional principle has fallen into neglect and must be restored to its original understanding. That judgment appears to be implicit in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000) and its progeny. That is not remotely the case with *Lockett* v. *Ohio*. The sweeping mandate of that case was completely rootless.

Lockett found its rule to be required by the Eighth Amendment. See 438 U. S., at 604. The starting point for determining what any provision of the Constitution requires is to ask what it was understood to require when it was adopted. One of the best indications of what sentencing practices were considered constitutional by the Framers is the brief criminal code enacted by the First Congress, Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 ("1790 Act"). See, *e.g.*, *United States* v. *Booker*, 543 U. S. 220, 329 (2005) (Breyer, J., dissenting in part). The drafters of this act were clearly aware of constitutional limits. The treason section closely follows the constitutional limit. Compare 1790 Act, § 1, with U. S. Const., Art. III, § 3.

Common law crimes are only made federal within federal enclaves and on the high seas. Compare 1790 Act, § 3 (murder) and *id.*, § 9 (robbery on the high seas), with *United States* v. *Morrison*, 529 U. S. 598, 601-602 (2000) (gender-motivated violence as a federal offense).

In regard to the discretion of the sentencer, it is evident that the First Congress believed the matter was entirely within legislative control. Traitors and murderers "shall suffer death," 1790 Act, §§ 1, 3, and benefit of clergy was prohibited. See *id.*, § 31. This might be considered the first federal "truth in sentencing" act. Death means death. Conversely, the First Congress felt authorized to grant unlimited discretion where it thought that advisable. Persons convicted of bribery "shall be fined and imprisoned at the discretion of the court . . . ." *Id.*, § 21.

Lockett also found its command to be based on the Fourteenth Amendment, see 438 U. S., at 604, presumably on the theory that it incorporated the Eighth. Whatever the theory, *Lockett*'s requirement of unlimited mitigation could not reasonably be considered to have been constitutionally required during Reconstruction. The transition from mandatory to discretionary capital sentencing was under way at that time, but it was by no means complete. Congress did not follow the trend until three decades after it proposed the Fourteenth Amendment. See *McGautha* v. *California*, 402 U. S. 183, 199-200 (1971).

Original understanding can be the end point as well as the starting point for some constitutional provisions, see, *e.g.*, *Stogner* v. *California*, 539 U. S. 607, 611-612 (2003) (contemporary understanding of *Ex Post Facto* Clause), but this position would be hard to defend for the Cruel and Unusual Punishments Clause. A modern reenactment of the original penalty of "thirty-nine stripes" for falsifying court records, see 1790 Act, § 15, would doubtless be swiftly struck down. A punishment which was not considered cruel and was not at all unusual in 1789 may become both in later years, and hence

unconstitutional, if it is rejected universally or nearly so by society. See *Walton* v. *Arizona*, 497 U. S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (noting conjunctive "unusual" requirement).

One might argue that the *Lockett* rule was made a constitutional requirement by the universal shift to complete discretion in the late nineteenth through mid-twentieth century, see *McGautha*, 402 U. S., at 199-201, but this argument runs into a brick wall in *Furman* v. *Georgia*, 408 U. S. 238 (1972) (*per curiam*). *Furman* held that the unlimited discretion statutes then in effect throughout the country were forbidden by the Eighth Amendment. The same provision of the Constitution cannot simultaneously forbid a practice and require the same practice, unless the goal is to intentionally set up an unresolvable paradox. See *Callins* v. *Collins*, 510 U. S. 1141, 1151-1152, 1159 (1994) (Blackmun, J., dissenting from denial of certiorari) (proposing judicial abolition of capital punishment due to conflicting court-created rules); cf. *id.*, at 1142 (Scalia, J., concurring) (concluding instead that if two rules conflict, one must be wrong).

The post-*Furman* statutes which were in effect at the time *Lockett* was decided provide no support for any contention that limitations on mitigation were "unusual" in the constitutional sense. Four of the five statutes examined in the *Gregg* cases limited mitigation in varying degrees. Georgia stood alone in a clear statutory endorsement of "anything goes" mitigation. See *Gregg*, 428 U. S., at 197; cf. *supra*, at 8-9 (Florida and Texas systems).

With no basis in original understanding, with an argument based on pre-*Furman* practice blocked by *Furman* itself, and with no basis in post-*Furman* statutes, *Lockett* stands as a naked judicial fiat. The rule proposed by the *Lockett* plurality and accepted by a majority in *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) was a legislative act of policy preference, not a principled exercise of the judicial power.

C. Tinkering.

"I no longer shall tinker with the machinery of death," Justice Blackmun declared in *Callins*, 510 U. S., at 1145 (opinion dissenting from denial of certiorari). Cessation of tinkering is an excellent idea, particularly when the tinkerer never had a license to tinker in the first place.

> "But the Federal Constitution, *which marks the limits of our authority* in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court." *McGautha*, 402 U. S., at 221 (emphasis added).

Amicus CJLF does not suggest that *Lockett* be overruled. Considerations of *stare decisis* weigh heavily in such a decision, and in any event that step should not be taken in a case which does not require it. We suggest that the Court "enforce a permanent truce between *Eddings* and *Furman*." *Graham* v. *Collins*, 506 U. S. 461, 498 (1993) (Thomas, J., concurring). A practice clearly prohibited by the *Lockett-Eddings* line can continue to be prohibited. The maintenance of these rules in their clearly established scope will cause little additional damage, because the states have already incorporated them into their statutes and standard jury instructions. However, *Lockett* should be strictly confined to its existing boundaries and not extended any further, with any doubts about its scope resolved in favor of the states' traditional constitutional authority to decide sentencing policy. There is no need in this case to overrule *Lockett*, but the Court should decline to extend it, "by even a fraction of an inch." Cf. *Silverman* v. *United States*, 365 U. S. 505, 512 (1961).

II. The Court of Appeals seriously misinterpreted *Boyde* v. *California*.

Six days after this Court decided *Brown* v. *Payton*, 544 U. S. 133 (2005), it vacated the Court of Appeals' prior decision in the present case and remanded for further consideration in light of *Payton*. See *Brown* v. *Belmontes*, 544 U. S. 945 (2005). While the holding of *Payton* is not on point because *Payton* is an AEDPA[3] case, see 544 U. S., at 147; *id.*, at 148-149 (Breyer, J., concurring), the obvious implication was that *Payton*'s discussion of *Boyde* v. *California*, 494 U. S. 370 (1990) clarified the meaning of *Boyde*, requiring a reexamination of the premises of the Court of Appeals' opinion in this case.

The panel majority was oblivious to the hint. See *Belmontes* v. *Brown*, 414 F. 3d 1094, 1101 (CA9 2005) ("*Belmontes V*"). The dissenters were not. See *id.*, at 1140-1141 (O'Scannlin, J., dissenting); *Belmontes* v. *Stokes*, 427 F. 3d 663, 665 (CA9 2005) (Callahan, J., dissenting from denial of rehearing en banc). No hint should have been needed. The error was apparent from *Boyde* on its face, even before *Payton*.

The Court of Appeals majority read *Boyde* as limiting its approval of California's prior catch-all instruction to evidence with a psychologically causal connection to the commission of the crime.

> "The Court held that, because the trial judge instructed the jury that it '*shall consider all of the evidence* which has been received during any part of the trial of this case,' there was no reasonable likelihood that the jury believed that factor (k) prevented it from considering the background and character evidence introduced by Boyde and its bearing on Boyde's commission of the crime. *Id.*, at 383 (emphasis in original). In other words, the Supreme Court held that the

---

3. Antiterrorism and Effective Death Penalty Act of 1996, 110 Stat. 1214 (1996).

> unadorned factor (k), at least when accompanied by an appropriate clarifying instruction, was constitutional as applied to mitigating evidence relating to the defendant's psychological make-up and history, which practically, if not legally, bore upon his commission of the crime and was offered for the purpose of reducing his culpability for the offense." *Belmontes V*, 414 F. 3d, at 1132 (footnote omitted).

This is an indefensible reading of the *Boyde* opinion. The phrase "and its bearing on *Boyde*'s commission of the crime" is neither a quote nor a paraphrase of anything in *Boyde*. Instead, the cited page says that, when considered with other factors "not associated with the crime itself," it is "improbable that jurors would arrive at an interpretation [of factor (k)] that precludes consideration of all *non-crime-related evidence*." *Boyde*, 494 U. S., at 383 (emphasis added). In addition, *Boyde* notes the jury would also have understood that it could consider Boyde's artistic ability, "because it showed that Boyde's criminal conduct was an aberration from otherwise good character." *Id.*, at 383, n. 5. This item of evidence has no connection with any conceivable theory of psychological causation for the crime, yet *Boyde* holds it was within the scope of this so-called "unadorned factor (k)" instruction.

If there were any doubt that *Boyde* includes all background and character evidence, not just evidence with a connection to the crime, the doubt was eliminated in *Payton*.

> "As to the text of factor (k), *Boyde* established that it does not limit the jury's consideration of extenuating circumstances solely to circumstances of the crime. See 494 U. S., at 382. In so holding, we expressly rejected the suggestion that factor (k) precluded the jury from considering evidence pertaining to a defendant's background and character because those circumstances did not concern the crime itself. *Boyde* instead found that factor (k), by its terms, directed the jury to consider any other circumstance that might excuse the crime, including factors related to a

defendant's background and character." *Payton*, 544 U. S., at 141-142.

Justice Breyer found two plausible distinctions in *Payton* from *Boyde* that might have prevailed in a non-AEDPA case: the pre-crime/post-crime distinction and the prosecutor's misleading argument. See *id.*, at 148-149 (concurring opinion). Neither of these distinctions is present in this case. See *supra*, at 3. Factually, this case is much more like *Boyde* than *Payton*. The "unadorned" instruction in *Boyde* was sufficient to inform the jury of the relevance of "precrime background and character," *id.*, at 148, and the "adorned" instruction and clarifying argument in this case did so even more clearly. See also *Middleton* v. *McNeil*, 541 U. S. 433, 438 (2004) (*per curiam*) (*Boyde*, ambiguous instructions, and clarifying arguments).

III. So long as all mitigating evidence can be given effect, existing law does not require that it be considered in every possible way.

After discussing the evidence in *Boyde* v. *California*, 494 U. S. 370 (1990), the Court of Appeals majority opinion says, "The same type of evidence, however, can serve an alternative forward-looking purpose, mitigating in a manner wholly unrelated to a petitioner's culpability for the crime he committed." *Belmontes V*, 414 F. 3d, at 1132. The implication that the defendant has a constitutional right to have his evidence considered for every purpose he wishes is flatly contrary to *Johnson* v. *Texas*, 509 U. S. 350 (1993).

In a sense, this case is a mirror image of *Johnson*, and the Court of Appeals majority opinion is a reflection of the dissent. Under the Texas system then in effect, the jury could consider mitigating circumstances only in the context of answering specific questions, one of which concerned future dangerousness. See *id.*, at 362-363.

The Texas Court of Criminal Appeals held that the jury could give mitigating effect to Johnson's youth through the dangerousness special issue. See *id.*, at 359. In this Court, the dissenters did not challenge that conclusion, but they contended that it was not enough. Future dangerousness and culpability are not the same thing, although they may be supported or refuted by the same evidence. See *id.*, at 376 (O'Connor, J., dissenting). Further, the dissent read *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982) as addressing a "constitutional requirement that a sentencer be allowed to give *full* consideration and *full* effect to mitigating circumstances . . . ." *Johnson*, *supra*, at 381 (emphasis in original). If this statement were found in an opinion of the Court issued prior to the day Belmontes' judgment became final, he would have a stronger case. The dissent, however, is not the law. It was not the day it was written, it is not today, and it was not in 1989.

The Court in *Johnson* held that accepting this argument would overrule *Jurek* v. *Texas*, 428 U. S. 262 (1976) and alter (*i.e.*, extend) the rule of *Lockett* and *Eddings*. See 509 U. S., at 372. "Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Ibid.* "As long as the mitigating evidence is within 'the effective reach of the sentencer,' the requirements of the Eighth Amendment are satisfied." *Id.*, at 368 (quoting *Graham* v. *Collins*, 506 U. S. 467, 475 (1993)).

Assuming for the sake of argument that California's catch-all factor does not include future nondangerousness as such, that would only be a constitutional defect if constitutionally relevant mitigating evidence were thereby placed beyond the reach of the sentencer. See *Penry* v. *Lynaugh*, 492 U. S. 302, 323 (1989) (evidence of retardation relevant only as aggravating, not mitigating, under Texas special issues); *Johnson*, 509 U. S., at 364-365 (discussing *Penry*).

The best predictor of future violence is past violence, see *Barefoot* v. *Estelle*, 463 U. S. 880, 922-923, n. 5 (1983) (Blackmun, J., dissenting), and the best evidence defendants can produce to show nondangerousness is a lack of a record of other serious crimes. They can also show past good behavior. Yet this evidence is precisely the "character or record" evidence that *Lockett*, 438 U. S., at 604, held the sentencer must consider and that *Boyde* held the California instruction does include. Whether the Constitution requires a sentencer to consider evidence of nondangerousness when it relates to neither character nor record can be decided in a case that presents that question.[4] No such evidence is involved in this case.

According to the Court of Appeals majority opinion, the most important part of Belmontes' case in mitigation was his conduct while incarcerated in the California Youth Authority. See *Belmontes V*, 414 F. 3d, at 1134. This included his work on a fire crew, his leadership and responsibility on that crew, and his participation in a religious program. See *id.*, at 1108. This is background and character evidence. This is the kind of evidence that *Boyde* determined was within the reach of the sentencer as a " 'circumstance which extenuates the gravity of the crime . . . .' " See 494 U. S., at 381 (quoting instruction).

When mitigating evidence supports more than one argument against a death sentence, *Johnson* held that allowing the sentencer to give effect to that evidence through one vehicle is sufficient. It also held that a contrary rule would require overruling *Jurek*. *Graham* v. *Collins* had previously held that such a rule would be a new rule as of 1993. See 506 U. S., at

---

4. It would be exceedingly odd to hold that the Constitution *requires* "expert" prediction evidence in this area, a form of evidence so notoriously unreliable that three Justices of this Court concluded the Constitution *forbids* it. See *Barefoot*, 463 U. S., at 923 (Blackmun, J., dissenting).

477. *A fortiori*, such a rule would have been new when Belmontes' sentence became final four years earlier.

IV. Rules affecting only the discretionary sentencing decision should be categorically excluded from the second *Teague* exception.

Any claim that the extension of existing law made by the Court of Appeals in this case qualifies for the "watershed rule" exception to *Teague* v. *Lane*, 489 U. S. 288 (1989) could be dismissed with little more than a citation to *Graham* v. *Collins*, 506 U. S. 461, 477-478 (1993). However, an enormous amount of pointless litigation could be precluded by drawing a brighter line.

In his concurring and dissenting opinion in *Mackey* v. *United States*, 401 U. S. 667 (1971), Justice Harlan suggested an exception "for claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.' " *Id.*, at 693 (quoting *Palko* v. *Connecticut*, 302 U. S. 319, 325 (1937)). These are the very basic rules of fundamental fairness that were considered part of the Fourteenth Amendment's Due Process Clause even before the incorporation doctrine.[5] The purpose of this exception appears to be to explain Justice Harlan's continued concurrence in granting habeas relief to prisoners with claims under *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), which was then only eight years old. See *Mackey*, *supra*, at 694.

While *Teague* adopted Justice Harlan's proposal in most other respects, it raised the bar for this exception even higher. To qualify for the second exception, a new rule would have to meet both the *Palko* test of fundamentalness and Justice

---

5. The holding of *Palko* was that the Fifth Amendment's Double Jeopardy Clause was not such a rule. By the time of *Mackey*, the Double Jeopardy Clause was considered "incorporated," and *Palko* had been overruled. See *Benton* v. *Maryland*, 395 U. S. 784, 796 (1969).

Harlan's original proposal of " 'rules which significantly improve the pre-existing fact-finding procedures.' " *Teague*, 489 U. S., at 312 (quoting *Desist* v. *United States*, 394 U. S. 244, 262 (1969) (dissenting opinion)). Such a high standard raised the obvious question of whether any such rules remained to be made over a quarter century after *Gideon*. The *Teague* plurality answered cautiously, "we believe it unlikely that *many* such components of basic due process have yet to emerge." *Id.*, at 313 (emphasis added).

In the 17 years since *Teague*, this Court has not found a single new rule to qualify for this exception. See *Beard* v. *Banks*, 542 U. S. 406, 417 (2004). It has found a great many rules and proposed rules that do not. A handful of circuit cases have found rules to qualify, see, *e.g.*, *Bockting* v. *Bayer*, 399 F. 3d 1010, 1012-1013 (CA9 2005), cert. granted *sub nom. Whorton* v. *Bockting*, No. 05-595, May 15, 2006, but Congress had so little confidence in the Court of Appeals' decisions on retroactivity that it limited the retroactive rule exception for successive petitions to rules "made retroactive . . . by the Supreme Court." See 28 U. S. C. § 2244(b)(2)(A).

In the post-*Teague* cases, this Court has only marginally clarified the definition of the second exception. There are repeated statements along the lines that a qualifying rule would have to be of the "primacy and centrality" of *Gideon*. See, *e.g.*, *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990).

The farther we go down the path of the evolution of criminal procedure, the less likely it becomes that any "absolute prerequisite to fundamental fairness," *Teague*, 489 U. S., at 314, remains unrecognized. Justice Stevens recognized the connection between the fundamental nature of a rule and the time of its recognition in his dissent in *Rose* v. *Lundy*, 455 U. S. 509, 544, and nn. 9-11 (1982), where he illustrated "fundamental" by reference to the "classic grounds" for habeas corpus—all rules which predate *Gideon*.

Tyler v. *Cain*, 533 U. S. 656 (2001) contains an important shift in language which recognizes this further diminution in the probability of the existence of any new, fundamental rule. There the Court said, "it is unlikely that *any* of these watershed rules 'ha[s] yet to emerge.' " *Id.*, at 667, n. 7 (emphasis added); see also *Schriro* v. *Summerlin*, 542 U. S. 348, 352 (2004) (quoting *Tyler*). The shift from "many" in 1989 to "any" in 2001 recognizes that the probability is asymptotically approaching zero.

Because the second exception exists in theory, it must be litigated for every new rule in every circuit, except for the rules where this Court decides the question. Yet this Court cannot decide the question on every rule. The fact that the retroactivity of *Mills* v. *Maryland*, 486 U. S. 367 (1988) remained undecided for 16 years until *Beard* v. *Banks*, *supra*, despite long-standing circuit splits and numerous petitions for certiorari, vividly illustrates the problem. See, *e.g.*, Petition for Writ of Certiorari in *Dixon* v. *Williams*, No. 92-111 (requesting resolution of the circuit split 12 years before *Banks*). The *Teague* opinion denounced the "unfortunate disparity in the treatment of similarly situated defendants on collateral review" that resulted from varying decisions in the lower courts on retroactivity under the prior doctrine. *Teague*, 489 U. S., at 305. Yet the same result has followed under *Teague* from confusion over the second exception.

In the near future, *amicus* CJLF believes it will be appropriate for the Court to accept that there are *no* rules of the "primacy and centrality of . . . *Gideon*" remaining to be made. The second exception can then be formally retired as unnecessary and the litigation it creates ended. For the present case, we propose a more limited curtailment. We propose a bright-line rule that new rules which govern the process of choosing a sentence within the range for which the defendant is eligible are *per se* outside the second exception.

Both this Court and the Congress have altered the law of habeas corpus over the course of the last 30 years with two

goals in mind: to keep the writ available to correct fundamental miscarriages of justice and to curtail its misuse for endless relitigation of questions already reasonably resolved once. To reconcile these competing goals, new limitations on the writ have typically come with "actual innocence" exceptions. See *Murray* v. *Carrier*, 477 U. S. 478, 495-496 (1986); 28 U. S. C. § 2244(b)(2)(B)(ii). The unifying theme is to tighten restrictions in the interest of finality and federalism but relax them to avoid a fundamental miscarriage of justice. The *Teague* rule is an important part of the tightening, and the second exception is based on the actual innocence consideration. See *Withrow* v. *Williams*, 507 U. S. 680, 699-700 (1993) (O'Connor, J., concurring in part and dissenting in part).

The second exception to *Teague* is closely related to the actual innocence exception of *Carrier*, as *Teague* itself makes clear. See 489 U. S., at 313. Application of this exception to capital cases is therefore illuminated by two cases defining the *Carrier* exception: *Sawyer* v. *Whitley*, 505 U. S. 333 (1992) and *Schlup* v. *Delo*, 513 U. S. 298 (1995).

Sawyer noted that in an ordinary criminal case, the "fundamental miscarriage of justice" exception meant that the person was "actually innocent," which in turn simply meant that "the State has convicted the wrong person of the crime." See 505 U. S., at 340. In the context of capital sentencing, *Sawyer* rejected the argument that the concept extended beyond eligibility for the death penalty (*i.e.*, truth of at least one aggravating factor) to "the ultimate discretionary decision between the death penalty and life imprisonment." *Id.*, at 343. A "fundamental miscarriage of justice," for this purpose, means only a death sentence imposed on a person legally ineligible for it, not a sentence within the discretionary range. See *id.*, at 347. *Schlup* further distinguished actual innocence of the crime from ineligibility for the penalty. The greater importance of *real* innocence warranted a more relaxed standard for the exception to finality. See 513 U. S., at 324.

If we take the *Sawyer/Schlup* implementation of *Carrier* along with *Teague*'s reliance on *Carrier* for the second exception, a simple, clear, bright line becomes visible. Just as issues relating only to the discretionary sentencing decision *never* qualify for the "fundamental miscarriage of justice" exception of *Carrier*, so new rules relating only to the operation of that discretionary step *never* qualify for the second exception to *Teague*.

The bar for death-eligibility is very high. First, the defendant must be guilty of murder, not some lesser offense. See *Coker* v. *Georgia*, 433 U. S. 584, 592 (1977) (plurality opinion). The class of murderers must be further narrowed by objective factors in the form of aggravating circumstances or a higher degree of murder. See *Tuilaepa* v. *California*, 512 U. S. 967, 971-972 (1994). The defendant must not qualify for a growing list of exclusion criteria. See *Enmund* v. *Florida*, 458 U. S. 782, 797 (1982) (minor accomplice without intent to kill); *Atkins* v. *Virginia*, 536 U. S. 304, 318 (2002) (mentally retarded); *Roper* v. *Simmons*, 543 U. S. 551, 574-575 (2005) (age). Once the case has cleared all those hurdles, it is difficult to imagine a case where the justice of the death penalty is not a matter of opinion on which reasonable people can and will differ.

A bright-line rule "is designed to avoid the costs of excessive inquiry where [it] will achieve the correct result in almost all cases." *Coleman* v. *Thompson*, 501 U. S. 722, 737 (1991). Categorically excluding the regulation of discretionary sentencing from the second *Teague* exception satisfies that criterion. The only rules in this area that are even arguably of the "primacy and centrality of . . . *Gideon*" are those of *Gregg* v. *Georgia*, 428 U. S. 153 (1976) and its companion cases. Since then, every defendant sentenced to death has been entitled to a narrowed definition of eligibility and an individualized consideration of mitigating circumstances. By comparison, all the rules created since then have amounted to fine tuning within these broad outlines.

The continued existence in theory of an exception which never applies in fact serves only to delay justice in cases where it is already long overdue and to squander resources better spent elsewhere. We have devoted far too large a share of our case review resources on the claims of unquestionably guilty murderers, claims which have nothing to do with guilt or innocence.

The only consequence of a *Teague* bar is that the habeas petitioner's sentence is judged by the standards in effect at the time of his direct appeal. See *Sawyer* v. *Smith*, 497 U. S. 227, 243 (1990). That includes all the requirements of *Gregg* and its companion cases. For issues having no relation whatever to actual innocence of the murder, that is sufficient to avoid a fundamental miscarriage of justice.

The issue in the present case has nothing to do with guilt of the offense and nothing to do with eligibility for the death penalty. The second-exception argument could be summarily dismissed, as this Court has done in many cases. See, *e.g.*, *Gray* v. *Netherland*, 518 U. S. 152, 170 (1996). However, a substantial step toward achieving the goals set out in *Teague* could be achieved by simply declaring the second exception to be *per se* inapplicable to rules governing the discretionary sentencing decision.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit should be reversed.

June, 2006

Respectfully submitted,

KENT S. SCHEIDEGGER
Attorney for Amicus Curiae
Criminal Justice Legal Foundation

(5)

No. 05-493

FILED
JUN 22 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT AYERS, Acting Warden,
Petitioner,

v.

FERNANDO BELMONTES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF TEXAS AND SIXTEEN OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

*Counsel of Record

GENA BUNN
Chief, Postconviction
Litigation Division

* EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 936-1400

ATTORNEYS FOR *AMICI CURIAE*
[Additional counsel listed inside]

TROY KING
Attorney General of Alabama
11 South Union Street
Montgomery, Alabama 36130
(334) 353-3915

TERRY GODDARD
Arizona Attorney General
1275 West Washington
Phoenix, Arizona 85007-2997
(602) 542-4686

MIKE BEEBE
Arkansas Attorney General
323 Center Street
Little Rock, Arkansas 72201
(501) 682-2007

JOHN W. SUTHERS
Colorado Attorney General
1525 Sherman St., Fifth Floor
Denver, Colorado 80203
(303) 866-3052

CHARLES J. CRIST, JR.
Attorney General of Florida
The Capitol PL-01
Tallahassee, Florida 32399-1050
(850) 414-3300

LAWRENCE G. WASDEN
Idaho Attorney General
P. O. Box 83720
Boise, Idaho 83720-0010

LISA MADIGAN
Illinois Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 814-3698

JIM HOOD
Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

GEORGE J. CHANOS
Attorney General
Nevada Department of Justice
100 North Carson Street
Carson City, Nevada 89701

PATRICIA A. MADRID
New Mexico Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 97504-1508

JIM PETRO
Ohio Attorney General
30 E. Broad St., 17th Floor
Columbus, Ohio 43215
(614) 466-8980

THOMAS W. CORBETT, JR.
Attorney General
Commonwealth of Pennsylvania
16th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-3391

HENRY D. McMASTER
Attorney General of South Carolina
P. O. Box 11549
Columbia, South Carolina 29211
(803) 734-3970

MARK L. SHURTLEFF
Utah Attorney General
Utah State Capitol Complex
East Office Bldg., Suite 320
Salt Lake City, Utah 84114-2320
(801) 538-9600

ROBERT F. McDONNELL
Attorney General of Virginia
900 East Main Street
Richmond, Virginia 23219
(804) 786-2436

ROB McKENNA
Attorney General of Washington
1125 Washington Street
P.O. Box 40100
Olympia, Washington 98504-0100

This is a capital case.

QUESTIONS PRESENTED

1. Does *Boyde v. California,* 494 U.S. 370 (1990), confirm the constitutional sufficiency of California's "unadorned factor (k)" instruction where a defendant presents mitigating evidence of his background and character which relates to, or has a bearing on, his future prospects as a life prisoner?

2. Does the Ninth Circuit's holding, that California's "unadorned factor (k)" instruction is constitutionally inadequate to inform jurors they may consider "forward-looking" mitigation evidence, constitute a "new rule" under *Teague v. Lane,* 489 U.S. 288 (1989)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 3

I. When Applying *Boyde*, Distinctions Between Forward-looking and Backward-looking Evidence Do Not Affect the Eighth Amendment Analysis. 4

II. Nevertheless, the Catchall Mitigation Instruction Employed Cured Any Eighth Amendment Error. 7

CONCLUSION 9

TABLE OF AUTHORITIES

Cases **Page**

Belmontes v. Brown, 414 F.3d 1094 (9th Cir. 2005) . . . . *passim*

Blystone v. Pennsylvania, 494 U.S. 299 (1990) 2,8

Booth v. Maryland, 482 U.S. 496 (1987) 3

Boyde v. California, 494 U.S. 370 (1990) . . . . . *passim*

Brown v. Payton, 544 U.S. 133 (2005) 2

California v. Brown, 479 U.S. 538 (1987) 3

Eddings v. Oklahoma, 455 U.S. 104 (1982) 3,8

Franklin v. Lynaugh, 487 U.S. 164 (1988) . . . . . *passim*

Graham v. Collins, 506 U.S. 461 (1993) 6

Johnson v. Texas, 509 U.S. 350 (1993) . . . . . *passim*

Lockett v. Ohio, 438 U.S. 586 (1978) 3,7

Payne v. Tennessee, 501 U.S. 808 (1991) 3-4

Penry v. Johnson, 532 U.S. 782 (2001) 2,8

Penry v. Lynaugh, 492 U.S. 302 (1989) 3,5

People v. Belmontes, 755 P.2d 310 (Cal. 1988),
cert. denied, 488 U.S. 1034 (1989) 1

Reddix v. State, 381 So.2d 999 (Miss. 1980) 7

Roberts v. State, 910 P.2d 1071 (Ok. Crim. App. 1996) 7

Simmons v. State, 419 So.2d 316 (Fla. 1982) 7

Skipper v. South Carolina, 476 U.S. 1 (1986) . . . . . *passim*

State v. Nelson, 501 S.E.2d 716 (S.C. 1998) 7

TABLE OF AUTHORITIES, continued

Cases **Page**

St. Clair v. Commonwealth, 140 S.W.3d 510 (Ky. 2004) 7

Teague v. Lane, 489 U.S. 288 (1989) i

Tuilaepa v. California, 512 U.S. 967 (1994) 2,5

Woodson v. North Carolina, 428 U.S. 280 (1976) 3

Zant v. Stephens, 462 U.S. 862 (1983) 4

Constitutions and Statutes

42 PA. CONS. STAT. § 9711(e)(8) 8

TEX. CODE CRIM. PROC. ANN. art. 37.071 5,8

INTEREST OF *AMICI CURIAE*

Amici States have a substantial interest in ensuring the validity of death sentences obtained through constitutional means. States also have an interest in defending clearly drafted sentencing statutes — such as the instant California catchall mitigation instruction — from *ad hoc* and unwarranted collateral attacks in federal court. If the lower court's decision is allowed to stand, the policy of finality embodied in *Boyde v. California,* 494 U.S. 370 (1990), will be a nullity. This policy crucially protects state court judgments based on constitutional sentencing proceedings where an appellate court — sometimes decades later — recharacterizes the mitigating evidence in a way no reasonable jury would in order to obtain relief for a death-sentenced inmate. *Amici* States are prejudiced by such actions which are often based on nothing more than supposition and speculation. Thus, the Attorney General of Texas, and the attorneys general of *amici* States, have a significant stake in this Court's resolution of the Questions Presented.

SUMMARY OF THE ARGUMENT

Respondent Fernando Belmontes was convicted of the brutal murder of Stacy McConnell in Victor, California in 1981. During the sentencing phase of Belmontes's capital trial, the defense presented evidence of his troubled childhood, wholesome character, and good behavior during a prior commitment to the California Youth Authority in mitigation of punishment. This evidence was offered to show that Belmontes was not incorrigible and could make a positive contribution to prison society if incarcerated for life.

The jury was then presented with a catchall mitigation instruction submitted as part of a longer, non-exhaustive list of mitigating factors to be considered.[1] Ultimately, however, the jury

---

1 Notably, the trial court instructed the jury that its consideration of aggravating evidence *was* limited to the enumerated factors in the instructions.

sentenced Belmontes to death and the California Supreme Court affirmed. *People v. Belmontes,* 755 P.2d 310 (Cal. 1988), *cert. denied,* 488 U.S. 1034 (1989).

Belmontes's state and federal district court collateral attacks were unsuccessful, but the United States Court of Appeals for Ninth Circuit eventually held — for reasons Belmontes himself *never* advanced — that his death sentence was unconstitutional because the catchall mitigation instruction prevented the jury from duly considering his mitigating evidence. *Belmontes v. Brown,* 414 F.3d 1094 (9th Cir. 2005). This Court granted certiorari review and should now reverse.

The Ninth Circuit's decision relies upon a spurious distinction between forward- and backward-looking mitigating evidence that finds no support in this Court's decisions. Initially, this Court has implicitly rejected the lower court's reasoning in both *Franklin v. Lynaugh,* 487 U.S. 164 (1988) (plurality opinion), and *Johnson v. Texas,* 509 U.S. 350 (1993), where it held that there was no practical difference between forward- and backward-looking sentencing considerations. Further, state courts have taken a similar approach, largely relying on this Court's reasoning in *Tuilaepa v. California,* 512 U.S. 967, 977 (1994), and *Skipper v. South Carolina,* 476 U.S. 1 (1986). The court below clearly erred when it held that such a distinction creates a reasonable likelihood of Eighth Amendment error.

Regardless, the lower court's opinion is in direct conflict with this Court's holdings in *Boyde* and *Brown v. Payton,* 544 U.S. 133 (2005), which approved of the California catchall mitigation instruction. In fact, this Court has long noted that such catchall instructions are sufficient to protect a capital defendant's interest in individualized sentencing. *See, e.g., Penry v Johnson,* 532 U.S. 782, 803 (2001); *Blystone v. Pennsylvania,* 494 U.S. 299, 305 (1990). Consequently, the Attorney General of Texas, and the attorneys general of *amici* States, respectfully suggest that this Court should reverse and hold that catchall instructions on mitigating evidence are constitutionally adequate for Eighth

Amendment purposes.

ARGUMENT

At the root of this Court's capital jurisprudence are found the competing — and arguably irreconcilable — interests involved in capital sentencing: the requirement for an individualized determination of moral culpability based on both aggravating and mitigating factors, and the need to guide and channel a jury's consideration of these factors adequately so as not to render the result arbitrary and capricious. The *Woodson* line of cases first construed the Eighth Amendment to require that a capital sentencing jury not be precluded from consideration, as a mitigating factor, of the character and record of the individual offender, as well as the circumstances of the particular offense. *Eddings v. Oklahoma,* 455 U.S. 104, 111-12 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (plurality opinion); *Woodson v. North Carolina,* 428 U.S. 280, 303-04 (1976).

As the Court later explained, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (quoting *California v. Brown,* 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). Additionally, there is no question that "testimony regarding [a] petitioner's character and his probable future conduct if sentenced to life in prison" is mitigating "in the sense that [it] might serve 'as a basis for a sentence less than death.'" *Skipper,* 476 U.S. at 4-5 (quoting *Lockett,* 438 U.S. at 604). This is because "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison *is itself an aspect of his character* that is by its nature relevant to the sentencing determination." *Id.* at 7 (emphasis added).

However, it is not constitutionally required that

consideration of mitigating evidence be structured or balanced in any particular way. *Franklin*, 487 U.S. at 179; *Booth v. Maryland*, 482 U.S. 496, 502 (1987), *overruled on other grounds*, *Payne v. Tennessee*, 501 U.S. 808 (1991); *Zant v. Stephens*, 462 U.S. 862, 875-76 (1983). Indeed, the Court has acknowledged that a *mere possibility* that the jury was precluded from considering relevant mitigating evidence by a particular jury instruction or sentencing mechanism does *not* establish Eighth Amendment error. *Boyde*, 494 U.S. at 380. Rather, such error occurs only if there is a "reasonable likelihood" that the jury applied its instructions in a way that prevented the consideration of such evidence. *Id.* This harm requirement reflects the "strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation," as well as a state's interest in providing the jury with a framework for discharging its awesome capital sentencing responsibilities. *Id.*; *Franklin*, 487 U.S. at 179.

I. When Applying *Boyde*, Distinctions Between Forward-looking and Backward-looking Evidence Do Not Affect the Eighth Amendment Analysis.

The Ninth Circuit erred when it held that there was a reasonable probability Belmontes's jury was unable to consider evidence that "he would live a constructive life in prison and make positive contributions to others if granted life without the possibility of parole." *Belmontes*, 414 F.3d at 1129. The lower court reached this conclusion despite the fact that Belmontes's jury was provided with a catchall mitigation instruction which permitted it to consider "[a]ny other circumstance which extenuates the gravity of the crime." *Id.* at 1130. The court of appeals relied upon a specious distinction to reach its holding, *i.e.*, that forward-looking evidence "wholly unrelated to [Belmontes]'s culpability" was somehow different than "backward-looking" evidence in the way it related to California's catchall instruction. *Id.* at 1134. As a result, the court below found that *Boyde* — which dealt with the exact same instruction at issue in the instant case — was inapplicable. *Id.* The lower court was wrong.

While this Court's jurisprudence has recognized a distinction between forward- and backward-looking evidence, it is a distinction without a difference for Eighth Amendment purposes. *See Tuilaepa*, 512 U.S. at 977 ("Both a backward-looking and a forward-looking inquiry are a permissible part of the sentencing process"). As the Court explained in *Skipper*, testimony concerning a defendant's future prospects in prison merely reflects an aspect of that defendant's character. 476 U.S. at 7. And contrary to the Ninth Circuit's opinion below, good character is certainly viewed by society as mitigating. *Penry v. Lynaugh*, 492 U.S. at 319; *cf. Belmontes*, 414 F.3d at 1134.

This is true regardless of whether the evidence demonstrates that the defendant possessed positive character traits in the past or the potential for such traits in the future. In either case, good character extenuates the gravity of the crime to some degree. While there may be no societal consensus concerning *how* mitigating good character may be, this is a sentencing decision best left to juries, which may consider the individual circumstances of the offender and the offense. By deciding there was a reasonable likelihood the jury did not weigh Belmontes's mitigating evidence, the court below violated the province of the jury.

Indeed, this Court implicitly rejected a distinction between forward- and backward-looking mitigating evidence in *Franklin v. Lynaugh*. In *Franklin*, the plurality held that Texas's future dangerousness special issue was sufficient to encompass evidence of Franklin's good disciplinary record during a prior incarceration. 487 U.S. at 177-83. The jury instruction at issue queried the jury concerning future conduct.[2] Yet the Court deemed it adequate to

---

2 The future dangerousness inquiry asks, "Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant ... would commit criminal acts of violence that would constitute a continuing threat to society?" *Franklin*, 487 U.S. at 168 n.3 (citing TEX. CODE CRIM. PROC. Art. 37.071(b)).

give effect to evidence of past conduct. *Id.* at 178-79. This is because future conduct and past conduct both reflect on a defendant's character and, in essence, his or her deathworthiness. *Id.*; *cf. id.* at 185 (recognizing that evidence of past conduct had no constitutionally mitigating relevance to show positive character beyond the future "ability to exist in prison without endangering jailers or fellow inmates") (O'Connor, J., concurring). Thus, although *Franklin* was a plurality opinion, a majority of the Court agreed the Eighth Amendment requires only that a jury be able to give effect to a defendant's mitigating character evidence, not that it must consider forward- and backward-looking aspects of that character independently.

The Court again refused to acknowledge such a concept in *Johnson v. Texas*. There the Court held that the same Texas special issue was constitutionally adequate to encompass mitigating evidence of youth. 509 U.S. at 353. The Court first explained that Johnson's suggestion that his crime was attributable to his youth — a distinctly backward-looking viewpoint — was within the jury's effective reach in answering the forward-looking future dangerousness inquiry. *Id.* at 368-69. This is because "the impetuousness and recklessness" of youth subsides with age. *Id.* at 368. Essentially, past character begets future character; the two categories of evidence are actually one in the same.

Moreover, given the fact that the *Johnson* Court had the benefit of its earlier opinion in *Boyde*, the distinction between forward- and backward-looking evidence is even less meaningful. Application of the reasonable likelihood standard of *Boyde* with a "commonsense understanding of the instructions" does not allow for any other interpretation. 494 U.S. at 380-81; *see also Graham v. Collins*, 506 U.S. 461, 476 (1993) (the possibility that mitigating evidence might have "*some* arguable relevance beyond the special issues" was immaterial as long as the jury was able to give effect to the evidence in some meaningful way). The Ninth Circuit's decision to the contrary defies commonsense precisely because there is no reasonable, constitutional basis for it. Such a

result does not satisfy *Boyde*.

Various state courts have also rejected a distinction between forward- and backward-looking evidence in capital sentencing trials. *See, e.g., State v. Nelson,* 501 S.E.2d 716, 719 (S.C. 1998) (character includes backward-looking disposition to engage or not engage in certain behavior and forward-looking propensity to do so); *Simmons v. State,* 419 So.2d 316, 320 (Fla. 1982) (potential for rehabilitation is an element of a defendant's character relevant to mitigation under *Lockett*); *Reddix v. State,* 381 So.2d 999, 1010 (Miss. 1980) (consideration of defendant's favorable behavior both before and after the offense is relevant to deathworthiness). This is true even where — as in *Johnson* and *Franklin* — the actual sentencing inquiry is temporally limited. *See St. Clair v. Commonwealth,* 140 S.W.3d 510, 568 (Ky. 2004) (backward-looking inquiry into criminal history also allows for consideration of forward-looking evidence); *Roberts v. State,* 910 P.2d 1071, 1083 n.7 (Ok. Crim. App. 1996) ("Future threat can only be supported when past acts, coupled with the actions of the defendant in the current offense, together with any post-offense actions, provide a jury the factual basis needed to determine if a defendant will be a continuing threat to society").

Therefore, it is clear that assigning constitutional significance to whether punishment evidence is forward- or backward-looking is irrational. There is simply no reasonable likelihood Belmontes's jury believed it could not give effect to his evidence of possible future conduct within the catchall instruction at issue. As this Court explained in *Boyde,* jurors are not assumed to make severe, technical, and irrational distinctions that defy commonsense. 494 U.S. at 380-81. The lower court's decision, on the other hand, is the epitome of such illogic and must be reversed.

II. Nevertheless, the Catchall Mitigation Instruction Employed Cured Any Eighth Amendment Error.

Central to the Court's holding in *Boyde* was also the fact

that a catchall mitigation instruction — which directed the jury to consider "[a]ny other circumstance which extenuates the gravity of the crime" — did not prevent the jury from considering evidence of Boyde's good character. 494 U.S. at 381. And as demonstrated *supra*, the possibility Belmontes would be a model prisoner in the future surely reflected upon his character and may have extenuated or excused his deathworthiness in the eyes of the jurors. *Skipper*, 476 U.S. at 7. Thus, the catchall mitigation instruction submitted in this case —which is identical to the one given in *Boyde* — satisfied the Eighth Amendment requirements of *Eddings*.

This Court has repeatedly approved of such "clearly drafted catchall instruction[s] on mitigating evidence." *Penry v. Johnson*, 532 U.S. at 803. In *Penry v. Johnson*, the Court suggested that the Texas catchall instruction — "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed" — would satisfy the Eighth Amendment. *Id.* (citing TEX. CODE CRIM. PROC. Art. 37.071(2)(e)(1)).

Further, in *Blystone v. Pennsylvania*, the Court held that a catchall instruction providing for the consideration of "[a]ny other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense" satisfies the Eighth Amendment requirement that a "jury be allowed to consider and give effect to *all* relevant mitigating evidence." 494 U.S. at 305 (citing 42 PA. CONS. STAT. § 9711(e)(8)). The California catchall instruction is not meaningfully different and, arguably, is broader than either of these instructions because it does not restrict itself to the circumstances of the offense, character, or background. "Any other circumstance" means *any* other circumstance. There is no reasonable likelihood a jury would interpret such an instruction to exclude any type of evidence

from its consideration.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the lower court.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General
For Criminal Justice

GENA BUNN
Chief, Postconviction
Litigation Division

*EDWARD L. MARSHALL
Deputy Chief, Postconviction
Litigation Division

* Counsel of Record

P.O. Box 12548
Capitol Station
Austin, Texas 78711-2548
Tel: (512) 936-1400
Fax: (512) 320-8132
Email: elm@oag.state.tx.us

ATTORNEYS FOR
AMICI CURIAE